



Central Information Commission

RTI: A Compendium

7th Annual Convention 2012
12th & 13th October
DRDO Bhawan, New Delhi

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सत्यानन्द मिश्र
मुख्य सूचना आयुक्त
Satyananda Mishra
Chief Information Commissioner



सत्यमेव जयते

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FOREWORD

The compendium of the decisions of the Superior Courts namely the High Courts and Supreme Court assumes importance as the Supreme Court has stated in Writ Petition (Civil) No. 210 of 2012

“Thus, it is abundantly clear that the Information Commission is bound by the law of precedence, i.e., judgments of the High Court and the Supreme Court of India. In order to maintain judicial discipline and consistency in the functioning of the Commission, we direct that the Commission shall give appropriate attention to the doctrine of precedence and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case.”

The Commission has been bringing out the compendium of important cases for last 3 Annual Conventions now as these constitute precedents to be followed by both the Central and State information Commissions. It has been our endeavour to disseminate the knowledge about the provisions of the RTI Act through the decisions and it has been widely appreciated by all the stake holders.

I hope that this compendium will be found useful by all concerned.


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From the statement of objects and Reasons of the Right to Information Act, 2005, it is clear that this legislation was enacted to preserve the democratic ideals and to create a culture of transparency and accountability in the government and its instrumentalities to prevent corruption and bring efficiency in their functioning.

2. The RTI Act is in the eighth year of its implementation. It has produced tremendous results by way of empowering citizens to take charge of their lives by participating in the decision making processes and by challenging corrupt and arbitrary actions at all levels. Generation of awareness amongst the people regarding the provisions of this Act and its beneficial effects would make this law more effective and meaningful.

3. The present compendium comprises of land mark judgments of the Hon'ble Supreme Court of India and several High Courts passed during 2011. I hope, this ready-reckner would prove useful for the Information Commissioners and other stakeholders alike.

(M.L. Sharma)

Central Information Commissioner

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Declaration

The Central information Commission has only compiled the judgments, available in public domain, in this Compendium.

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 210 of 2012

Decided On: 13.09.2012

Appellants: **Namit Sharma**

Vs.

Respondent: **Union of India (UOI)**

Right to Information (RTI) - CIC Member Appointments

Hon'ble Judges:

A.K. Patnaik and Swatanter Kumar, JJ.

Subject: Right to Information

JUDGMENT

Swatanter Kumar, J.

1. The value of any freedom is determined by the extent to which the citizens are able to enjoy such freedom. Ours is a constitutional democracy and it is axiomatic that citizens have the right to know about the affairs of the Government which, having been elected by them, seeks to formulate some policies of governance aimed at their welfare. However, like any other freedom, this freedom also has limitations. It is a settled proposition that the Right to Freedom of Speech and Expression enshrined under Article 19(1)(a) of the Constitution of India (for short 'the Constitution') encompasses the right to impart and receive information. The Right to Information has been stated to be one of the important facets of proper governance. With the passage of time, this concept has not only developed in the field of law, but also has attained new dimensions in its application. This Court while highlighting the need for the society and its entitlement to know has observed that public interest is better served by effective application of the right to information. This freedom has been accepted in one form or the other in various parts of the world. This Court, in absence of any statutory law, in the

case of *Secretary, Ministry of Information and Broadcasting, Government of India and Ors. v. Cricket Association of Bengal and Anr.* MANU/SC/0246/1995 : (1995) 2 SCC 161 held as under:

The democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchy organizations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 1/2 per cent of the population has an access to the print media which is not subject to pre-censorship.

2. The legal principle of 'A man's house is his castle. The midnight knock by the police bully breaking into the peace of the citizen's home is outrageous in law', stated by Edward Coke has been explained by Justice Douglas as follows:

The free State offers what a police state denies - the privacy of the home, the dignity and peace of mind of the individual. That precious right to

be left alone is violated once the police enter our conversations.

3. The States which are governed by Policing and have a policy of greater restriction and control obviously restrict the enjoyment of such freedoms. That, however, does not necessarily imply that this freedom is restriction-free in the States where democratic governance prevails. Article 19(1)(a) of the Constitution itself is controlled by the reasonable restrictions imposed by the State by enacting various laws from time to time.

4. The Petitioner, a public spirited citizen, has approached this Court under Article 32 of the Constitution stating that though the Right to Information Act, 2005 (for short 'Act of 2005') is an important tool in the hands of any citizen to keep checks and balances on the working of the public servants, yet the criterion for appointment of the persons who are to adjudicate the disputes under this Act are too vague, general, ultra vires the Constitution and contrary to the established principles of law laid down by a plethora of judgments of this Court. It is the stand of the Petitioner that the persons who are appointed to discharge judicial or quasi-judicial functions or powers under the Act of 2005 ought to have a judicial approach, experience, knowledge and expertise. Limitation has to be read into the competence of the legislature to prescribe the eligibility for appointment of judicial or quasi-judicial bodies like the Chief Information Commissioner, Information Commissioners and the corresponding posts in the States, respectively. The legislative power should be exercised in a manner which is in consonance with the constitutional principles and guarantees. Complete lack of judicial expertise in the Commission may render the decision making process impracticable, inflexible and in given cases, contrary to law. The availability of expertise of judicial members in the Commission would facilitate the decision-making to be

more practical, effective and meaningful, besides giving semblance of justice being done. The provision of eligibility criteria which does not even lay down any qualifications for appointment to the respective posts under the Act of 2005 would be unconstitutional, in terms of the judgments of this Court in the cases of *Union of India v. Madras Bar Association* (2010) 11 SCC 1; *Pareena Swarup v. Union of India* MANU/SC/8086/2008 : (2008) 14 SCC 107; *L. Chandra Kumar v. Union of India* MANU/SC/0261/1997 : (1997) 3 SCC 261; *R.K Jain v. Union of India* MANU/SC/0291/1993 : (1993) 4 SCC 119; *S.P. Sampath Kumar v. Union of India* MANU/SC/0851/1987 : (1987) 1 SCC 124.

5. It is contended that keeping in view the powers, functions and jurisdiction that the Chief/State Information Commissioner and/or the Information Commissioners exercise undisputedly, including the penal jurisdiction, there is a certain requirement of legal acumen and expertise for attaining the ends of justice, particularly, under the provisions of the Act of 2005. On this premise, the Petitioner has questioned the constitutional validity of Sub-sections (5) and (6) of Section 12 and Sub-sections (5) and (6) of Section 15 of the Act of 2005. These provisions primarily deal with the eligibility criteria for appointment to the posts of Chief Information Commissioners and Information Commissioners, both at the Central and the State levels. It will be useful to refer to these provisions at this very stage.

Section 12 -- (5) The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

(6) The Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as

the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

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Section 15(5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance

(6) The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

6. The challenge to the constitutionality of the above provisions *inter alia* is on the following grounds:

- (i) Enactment of the provisions of eligibility criteria for appointment to such high offices, without providing qualifications, definite criterion or even consultation with judiciary, are in complete violation of the fundamental rights guaranteed under Article 14, 16 and 19(1)(g) of the Constitution.
- (ii) Absence of any specific qualification and merely providing for experience in the various specified fields, without there being any nexus of either of these fields to the object of the Act of 2005, is violative of the fundamental constitutional values.
- (iii) Usage of extremely vague and general terminology like social service, mass media and alike terms, being indefinite and undefined, would lead to arbitrariness and are open to abuse.
- (iv) This vagueness and uncertainty is bound to prejudicially affect the administration of justice by such Commissions or Tribunals which are vested with wide adjudicatory and penal powers. It may not be feasible for a person of ordinary experience to deal with such subjects with legal accuracy.
- (v) The Chief Information Commissioner and Information Commissioners at the State and Centre level perform judicial and/or quasi-judicial functions under the Act of 2005 and therefore, it is mandatory that persons with judicial experience or majority of them should hold these posts.
- (vi) The fundamental right to equality before law and equal protection of law guaranteed by Article 14 of the Constitution enshrines in itself the person's right to be adjudged by a forum which exercises judicial power in an impartial and independent manner consistent with the recognised principles of adjudication.
- (vii) Apart from specifying a high powered committee for appointment to these posts, the Act of 2005 does not prescribe any mechanism for proper scrutiny and consultation with the judiciary in order to render effective performance of functions by the office holders, which is against the basic scheme of our Constitution.
- (viii) Even if the Court repels the attack to the constitutionality of the provisions, still, keeping in view the basic structure of the Constitution and the independence of judiciary, it is a mandatory requirement that judicial or quasi-judicial powers ought to be exercised by persons having judicial knowledge and expertise. To that extent, in any case, these provisions would have to be read down. Resultantly, limitation has to be read into the competence of the legislature to prescribe requisite qualifications for

appointment of judicial or quasi-judicial bodies or tribunals.

Discussion

7. The Constitution of India expressly confers upon the courts the power of judicial review. The courts, as regards the fundamental rights, have been assigned the role of *sentinel on the qui vive* under Article 13 of the Constitution. Our courts have exercised the power of judicial review, beyond legislative competence, but within the specified limitations. While the court gives immense weightage to the legislative judgment, still it cannot deviate from its own duties to determine the constitutionality of an impugned statute. Every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality.

8. The foundation of this power of judicial review, as explained by a nine-Judge's Bench in the case of *Supreme Court Advocates on Record Association and Ors. v. Union of India* MANU/SC/0073/1994 : (1993) 4 SCC 441, is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the 'will' of the legislature as declared in the statute, stands in opposition to that of the people as declared in the Constitution - the 'will' of the people must prevail.

9. In determining the constitutionality or validity of a constitutional provision, the court must weigh the real impact and effect thereof, on the fundamental rights. The Court would not allow the legislature to overlook a constitutional provision by employing indirect methods. In *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* MANU/SC/0075/1980 : (1980) 3 SCC 625, this Court mandated without ambiguity, that it is the Constitution which is supreme in India and not the Parliament. The Parliament cannot damage the Constitution,

to which it owes its existence, with unlimited amending power.

10. An enacted law may be constitutional or unconstitutional. Traditionally, this Court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of Part III of the Constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened. D.D. Basu in the '*Shorter Constitution of India*' (Fourteenth Edition, 2009) has detailed, with reference to various judgments of this Court, the grounds on which the law could be invalidated or could not be invalidated. Reference to them can be made as follows:

Grounds of unconstitutionality. - A law may be unconstitutional on a number of grounds:

- i. Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Article 143, (Ref. MANU/SC/0048/1964 : AIR 1965 SC 745 (145): 1965(1) SCR 413)
- ii. Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the 7th Sch., read with the connected Articles. (Ref. Under Article 143 MANU/SC/0048/1964 : AIR 1965 SC 745)
- iii. Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Article 301. (Ref. *Atiabari Tea Co. v. State of Assam* MANU/SC/0030/1960 : AIR 1961 SC 232)
- iv. In the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State. (*State of Bombay*).

Chamarbaughwala R.M.D. MANU / SC/0019/1957 : AIR 1957 SC 699)

- v. That the Legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. Hamdard Dawakhana Wakf v. Union of India MANU/ SC/0016/1959 : AIR 1960 SC 554 (568)

11. On the other hand, a law cannot be invalidated on the following grounds:

- (a) That in making the law (including an Ordinance), the law-making body did not apply its mind (even though it may be a valid ground for challenging an executive act), (Ref. Nagaraj K. v. State of A.P. MANU/ SC/0343/1985 : AIR 1985 SC 551 (paras 31, 36), or was prompted by some improper motive. (Ref. Rehman Shagoo v. State of J and K MANU/SC/0028/1959 : AIR 1960 SC 1(6) : 1960(1) SCR 681)
- (b) That the law contravenes some constitutional limitation which did not exist at the time of enactment of the law in question. (Ref. Joshi R.S. v. Ajit Mills Ltd. MANU/SC/0300/1977 : AIR 1977 SC 2279 (para 16)
- (c) That the law contravened any of the Directive contained in Part IV of the Constitution. (Ref. Deep Chand v. State of U.P. MANU/SC/0023/1959 : AIR 1959 SC 648 (664)

12. Since great emphasis has been placed on the violation of fundamental rights, we may notice that no prejudice needs to be proved in cases where breach of fundamental rights is claimed. Violation of a fundamental right itself renders the impugned action void {Ref. A.R. Antulay v. R.S. Nayak and Anr. MANU/ SC/0002/1988 : (1988) 2 SCC 602}.

13. A law which violates the fundamental right of a person is void. In such cases of violation,

the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute. First and the foremost, as already noticed, is the competence of the legislature to make the law. The wisdom or motive of the legislature in making it is not a relative consideration. The Court should examine the provisions of the statute in light of the provisions of the Constitution (e.g. Part III), regardless of how it is actually administered or is capable of being administered. In this regard, the Court may consider the following factors as noticed in *D.D. Basu* (supra).

- (a) The possibility of abuse of a statute does not impart to it any element of invalidity.
- (b) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements.

In the case of *Charan Lal Sahu v. UOI* (1990) 1 SCC 614 (667) (para 13), MUKHERJEE, C.J. made an unguarded statement, viz., *that*

In judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into.

It can be supported only on the test of 'direct and inevitable effect' and, therefore, needs to be explained in some subsequent decision.

- (c) When the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the 'direct and inevitable effect' of such law.
- (d) There is presumption in favour of constitutionality of statutes. The law courts can declare the legislative enactment to be an invalid piece of legislation only in the even of gross violation of constitutional sanctions.

14. It is a settled canon of constitutional jurisprudence that the doctrine of classification

is a subsidiary rule evolved by courts to give practical content to the doctrine of equality. Over-emphasis of the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. (*Ref. LIC of India v. Consumer Education and Research Centre* MANU/SC/0772/1995 : (1995) 5 SCC 482: It is not necessary that classification in order to be valid, must be fully carried out by the statute itself. The statute itself may indicate the persons or things to whom its provisions are intended to apply. Instead of making the classification itself, the State may lay down the principle or policy for selecting or classifying the persons or objects to whom its provisions are to apply and leave it to the discretion of the Government or administrative authority to select such persons or things, having regard to the principle or policy laid down by the Legislature.

15. Article 14 forbids class legislation but does not forbid reasonable classification which means:

- (i) It must be based on reasonable and intelligible differentia; and
- (ii) Such differentia must be on a rational basis.
- (iii) It must have nexus to the object of the Act.

16. The basis of judging whether the institutional reservation, fulfils the above-mentioned criteria, should be a) there is a presumption of constitutionality; b) the burden of proof is upon the writ Petitioners, the person questioning the constitutionality of the provisions; c) there is a presumption as regard the States' power on the extent of its legislative competence; d) hardship of few cannot be the basis of determining the validity of any statute.

17. The principles for adjudicating the constitutionality of a provision have been stated by this Court in its various judgments. Referring to these judgments and more particularly to the cases of *Ram Krishna Dalmia v. Justice S.R. Tendolkar* MANU/SC/0024/1958 : AIR 1958 SC 538 and *Budhan Chodhry v. State of Bihar* MANU/SC/0047/1954 : AIR 1955 SC 191, the author Jagdish Swarup in his book 'Constitution of India (2nd Edition, 2006) stated the principles to be borne in mind by the Courts and detailed them as follows:

- (a) that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
- (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
- (c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
- (d) that the legislature is free to recognize decrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
- (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
- (f) that while good faith and knowledge of the existing conditions on the part of a

Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

18. These principles have, often been reiterated by this Court while dealing with the constitutionality of a provision or a statute. Even in the case of *Atom Prakash v. State of Haryana and Ors.* MANU/SC/0366/1986 : (1986) 2 SCC 249, the Court stated that whether it is the Constitution that is expounded or the constitutional validity of a statute that is considered, a cardinal rule is to look to the Preamble of the Constitution as the guiding light and to the Directive Principles of State Policy as the Book of Interpretation. The Constitution being *sui generis*, these are the factors of distant vision that help in the determination of the constitutional issues. Referring to the object of such adjudicatory process, the Court said:

....we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State. For example, when we consider the question whether a statute offends Article 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the Preamble and the Directive Principles enumerated in Part IV of the Constitution.

19. Dealing with the matter of closure of slaughter houses in the case of *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat and Ors.* MANU/SC/1246/2008 : (2008) 5 SCC 33, the Court while noticing its earlier judgment in the case of *Government of Andhra Pradesh and Ors.*

v. Smt. P. Laxmi Devi MANU/SC/1017/2008 : (2008) 4 SCC 720, introduced a rule for exercise of such jurisdiction by the courts stating that the Court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the Court should declare a provision to be unconstitutional. Further, in the case of *P. Lakshmi Devi* (supra), the Court has observed that even if two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must prevail and the Court must make efforts to uphold the constitutional validity of a statute, unlike a policy decision, where the executive decision could be rendered invalid on the ground of malafide, unreasonableness and arbitrariness alone.

20. In order to examine the constitutionality or otherwise of a statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as the legislative history of the statute. It would help the court in arriving at a more objective and justful approach. It would be necessary for the Court to examine the reasons of enactment of a particular provision so as to find out its ultimate impact *vis-à-vis* the constitutional provisions. Therefore, we must examine the contemplations leading to the enactment of the Act of 2005.

A) SCHEME, OBJECTS AND REASONS

21. In light of the law guaranteeing the right to information, the citizens have the fundamental right to know what the Government is doing in its name. The freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political growth. It is a safety valve. People are more ready to accept the decisions that go against them if they can in principle seem to influence them. In a way, it checks abuse of power by the public officials.

In the modern times, where there has been globalization of trade and industry, the scientific growth in the communication system and faster commuting has turned the world into a very well-knit community. The view projected, with some emphasis, is that the imparting of information qua the working of the government on the one hand and its decision affecting the domestic and international trade and other activities on the other, impose an obligation upon the authorities to disclose information.

OBJECTS AND REASONS

22. The Right to Information was harnessed as a tool for promoting development; strengthening the democratic governance and effective delivery of socio-economic services. Acquisition of information and knowledge and its application have intense and pervasive impact on the process of taking informed decision, resulting in overall productivity gains. It is also said that information and knowledge are critical for realising all human aspirations such as improvement in the quality of life. Sharing of information, for instance, about the new techniques of farming, health care facilities, hazards of environmental degradation, opportunities for learning and earning, legal remedies for combating gender bias etc., have overtime, made significant contributions to the well being of poor people. It is also felt that this right and the laws relating thereto empower every citizen to take charge of his life and make proper choices on the basis of freely available information for effective participation in economic and political activities.

23. Justice V.R. Krishna Iyer in his book "Freedom of Information" expressed the view:

The right to information is a right incidental to the constitutionally guaranteed right to freedom of speech and expression. The international movement to include it in the legal system gained prominence in 1946 with

the General Assembly of the United Nations declaring freedom of information to be a fundamental human right and a touchstone for all other liberties. It culminated in the United Nations Conference on Freedom of Information held in Geneva in 1948.

Article 19 of the Universal Declaration of Human Rights says:

Everyone has the right to freedom of information and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

It may be a coincidence that Article 19 of the Indian Constitution also provides every citizen the right to freedom of speech and expression. However, the word 'information' is conspicuously absent. But, as the highest Court has explicated, the right of information is integral to freedom of expression.

India was a member of the Commission on Human Rights appointed by the Economic and Social Council of the United Nations which drafted the 1948 Declaration. As such it would have been eminently fit and proper if the right to information was included in the rights enumerated under Article 19 of our Constitution. Article 55 of the U.N. Charter stipulates that the United Nations 'shall promote respect for, and observance of, human rights and fundamental freedoms' and according to Article 56 'all members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'.

24. Despite the absence of any express mention of the word 'information' in our Constitution under Article 19(1)(a), this right has stood incorporated therein by the interpretative process by this Court laying the unequivocal statement of law by this Court that there was a definite right to information of the citizens of

this country. Before the Supreme Court spelt out with clarity the right to information as a right inbuilt in the constitutional framework, there existed no provision giving this right in absolute terms or otherwise. Of course, one finds glimpses of the right to information of the citizens and obligations of the State to disclose such information in various other laws, for example, Sections 74 to 78 of the Indian Evidence Act, 1872 give right to a person to know about the contents of the public documents and the public officer is required to provide copies of such public documents to any person, who has the right to inspect them. Under Section 25(6) of the Water (Prevention and Control of Pollution) Act, 1974, every State is required to maintain a register of information on water pollution and it is further provided that so much of the register as relates to any outlet or effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises, as the case may be. Dr. J.N. Barowalia in *'Commentary on the Right to Information Act'* (2006) has noted that the Report of the *National Commission for Review of Working of Constitution under the Chairmanship of Justice M.N. Venkatachaliah*, as he then was, recognised the right to information wherein it is provided that major assumption behind a new style of governance is the citizen's access to information. Much of the common man's distress and helplessness could be traced to his lack of access to information and lack of knowledge of decision-making processes. He remains ignorant and unaware of the process which virtually affects his interest. Government procedures and Regulations shrouded in the veil of secrecy do not allow the litigants to know how their cases are being handled. They shy away from questioning the officers handling their cases because of the latter's snobbish attitude. Right to Information should be guaranteed and needs to be given real substance. In this regard, the Government

must assume a major responsibility and mobilize skills to ensure flow of information to citizens. The traditional insistence on secrecy should be discarded.

25. The Government of India had appointed a Working Group on Right to Information and Promotion of Open and Transparent Government under the Chairmanship of Shri H.D. Shourie which was asked to examine the feasibility and need for either full-fledged Right to Information Act or its introduction in a phased manner to meet the needs of an open and responsive Government. This group was also required to examine the framework of rules with reference to the Civil Services (Conduct) Rules and Manual of Office Procedure. This Working Group submitted its report in May 1997.

26. In the Chief Ministers Conference on 'Effective and Responsive Government' held on 24th May, 1997, the need to enact a law on the Right to Information was recognized unanimously. This conference was primarily to discuss the measures to be taken to ensure a more effective and responsive government. The recommendations of various Committees constituted for this purpose and awareness in the Government machinery of the significance and benefits of this freedom ultimately led to the enactment of the 'Freedom of Information Act, 2002' (for short, the 'Act of 2002'). The proposed Bill was to enable the citizens to have information on a statutory basis. The proposed Bill was stated to be in accord with both Article 19 of the Constitution of India as well as Article 19 of the Universal Declaration of Human Rights, 1948. This is how the Act of 2002 was enacted.

27. In terms of the Statement of Objects and Reasons of the Act of 2002, it was stated that this law was enacted in order to make the government more transparent and accountable to the public. It was felt that in the present democracy framework, free flow of

information for citizens and non-Government institutions suffers from several bottlenecks including the existing legal framework, lack of infrastructure at the grass root level and an attitude of secrecy within the Civil Services as a result of the old framework of rules. The Act was to do with all such aspects. The purpose and object was to make the government more transparent and accountable to the public and to provide freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto.

28. After the Act of 2002 came into force, there was a definite attempt to exercise such freedom but it did not operate fully and satisfactorily. The Civil Services (Conduct) Rules and the Manual of the Office Procedure as well as the Official Secrets Act, 1923 and also the mindset of the authorities were implied impediments to the full, complete and purposeful achievement of the object of enacting the Act of 2002. Since, with the passage of time, it was felt that the Act of 2002 was neither sufficient in fulfilling the aspirations of the citizens of India nor in making the right to freedom of information more progressive, participatory and meaningful, significant changes to the existing law were proposed. The National Advisory Council suggested certain important changes to be incorporated in the said Act of 2002 to ensure smoother and greater access to information. After examining the suggestions of the Council and the public, the Government decided that the Act of 2002 should be replaced and, in fact, an attempt was made to enact another law for providing an effective framework for effectuating the right to information recognized under the Article 19 of the Constitution. The Right to Information Bill was introduced in terms of its statements of objects and reasons to ensure greater and

more effective access to information. The Act of 2002 needed to be made even more progressive, participatory and meaningful. The important changes proposed to be incorporated therein included establishment of an appellate machinery with investigative powers to review the decision of the Public Information Officer, providing penal provisions in the event of failure to provide information as per law, etc. This Bill was passed by both the Houses of the Parliament and upon receiving the assent of the President on 15th June, 2005, it came on the statute book as the Right to Information Act, 2005.

SCHEME OF ACT OF 2005 (COMPARATIVE ANALYSIS OF ACT OF 2002 AND ACT OF 2005)

29. Now, we may deal with the comparative analysis of these two Acts. The first and the foremost significant change was the change in the very nomenclature of the Act of 2005 by replacing the word 'freedom' with the word 'right' in the title of the statute. The obvious legislative intent was to make seeking of prescribed information by the citizens, a right, rather than a mere freedom. There exists a subtle difference when people perceive it as a right to get information in contra-distinction to it being a freedom. Upon such comparison, the connotations of the two have distinct and different application. The Act of 2005 was enacted to radically alter the administrative ethos and culture of secrecy and control, the legacy of colonial era and bring in a new era of transparency and accountability in governance. In substance, the Act of 2005 does not alter the spirit of the Act of 2002 and on the contrary, the substantive provisions like Sections 3 to 11 of both the Acts are similar except with some variations in some of the provisions. The Act of 2005 makes the definition clause more elaborate and comprehensive. It broadens the definition of public authority under Section 2(h) by including therein even an authority

or body or institution of self-government established or constituted by a notification issued or order made by the appropriate Government and includes any body owned, controlled or substantially financed by the Government and also non-governmental organization substantially financed by the appropriate Government, directly or indirectly. Similarly, the expression 'Right to Information' has been defined in Section 2(j) to include the right to inspection of work, documents, records, taking certified samples of material, taking notes and extracts and even obtaining information in the form of floppies, tapes, video cassettes, etc. This is an addition to the important step of introduction of the Central and State Information Commissions and the respective Public Information Officers. Further, Section 4(2) is a new provision which places a mandatory obligation upon every public authority to take steps in accordance with the requirements of Clause (b) of Sub-section (1) of that Section to provide as much information suo moto to the public at regular intervals through various means of communication including internet so that the public have minimum resort to use of this Act to obtain information. In other words, the aim and object as highlighted in specific language of the statute is that besides it being a right of the citizenry to seek information, it was obligatory upon the State to provide information relatable to its functions for the information of the public at large and this would avoid unnecessary invocation of such right by the citizenry under the provisions of the Act of 2005. Every authority/department is required to designate the Public Information Officers and to appoint the Central Information Commission and State Information Commissions in accordance with the provisions of Sections 12 and 15 of the Act of 2005. It may be noticed that under the scheme of this Act, the Public Information Officer at the Centre and the State Levels are expected to receive the requests/applications

for providing the information. Appeal against decision of such Public Information Officer would lie to his senior in rank in terms of Section 19(1) within a period of 30 days. Such First Appellate Authority may admit the appeal after the expiry of this statutory period subject to satisfactory reasons for the delay being established. A second appeal lies to the Central or the State Information Commission, as the case may be, in terms of Section 19(3) within a period of 90 days. The decision of the Commission shall be final and binding as per Section 19(7). Section 19 is an exhaustive provision and the Act of 2005 on its cumulative reading is a complete code in itself. However, nothing in the Act of 2005 can take away the powers vested in the High Court under Article 226 of the Constitution and of this Court under Article 32. The finality indicated in Sections 19(6) and 19(7) cannot be construed to oust the jurisdiction of higher courts, despite the bar created under Section 23 of the Act. It always has to be read and construed subject to the powers of the High Court under Article 226 of the Constitution. Reference in this regard can be made to the decision of a Constitution Bench of this Court in the case of *L. Chandra Kumar v. Union of India and Ors.* MANU/SC/0261/1997 : (1997) 3 SCC 261.

30. Exemption from disclosure of information is a common provision that appears in both the Acts. Section 8 of both the Acts open with a non-obstante language. It states that notwithstanding anything contained in the respective Act, there shall be no obligation to give any citizen the information specified in the exempted clauses. It may, however, be noted that Section 8 of the Act of 2005 has a more elaborate exemption clause than that of the Act of 2002. In addition, the Act of 2005 also provides the Second Schedule which enumerates the intelligence and security organizations established by the Central Government to which the Act of 2005 shall not apply in terms of Section 24.

31. Further, under the Act of 2002, the appointment of the Public Information Officers is provided in terms of Section 5 and there exists no provision for constituting the Central and the State Information Commission. Also, the Act does not provide any qualifications or requirements to be satisfied before a person can be so appointed. On the other hand, in terms of Section 12 and Section 15 of the Act of 2005, specific provisions have been made to provide for the constitution of and eligibility for appointment to the Central Information Commission or the State Information Commission, as the case may be.

32. Section 12(5) is a very significant provision under the scheme of the Act of 2005 and we shall deal with it in some elaboration at a subsequent stage. Similarly, the powers and functions of the Authorities constituted under the Act of 2005 are conspicuous by their absence under the Act of 2002, which under the Act of 2005 are contemplated under Section 18. This section deals in great detail with the powers and functions of the Information Commissions. An elaborate mechanism has been provided and definite powers have been conferred upon the authorities to ensure that the authorities are able to implement and enforce the provisions of the Act of 2005 adequately. Another very significant provision which was non-existent in the Act of 2002, is in relation to penalties. No provision was made for imposition of any penalty in the earlier Act, while in the Act of 2005 severe punishment like imposition of fine upto Rs. 250/- per day during which the provisions of the Act are violated, has been provided in terms of Section 20(1). The Central/ State Information Commission can, under Section 20(2), even direct disciplinary action against the erring Public Information Officers. Further, the appropriate Government and the competent authority have been empowered to frame rules under Sections 27 and 28 of the Act of 2005, respectively, for carrying out the provisions of the Act. Every rule made by the

Central Government under the Act has to be laid before each House of the Parliament while it is in session for a total period of 30 days, if no specific modifications are made, the rules shall thereafter have effect either in the modified form or if not annulled, it shall come into force as laid.

33. Greater transparency, promotion of citizen-government partnership, greater accountability and reduction in corruption are stated to be the salient features of the Act of 2005. Development and proper implementation of essential and constitutionally protected laws such as Mahatma Gandhi Rural Guarantee Act, 2005, Right to Education Act, 2009, etc. are some of the basic objectives of this Act. Revelation in actual practice is likely to conflict with other public interests, including efficiency, operation of the government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information. It is necessary to harness these conflicting interests while preserving the parameters of the democratic ideal or the aim with which this law was enacted. It is certainly expedient to provide for furnishing certain information to the citizens who desire to have it and there may even be an obligation of the state authorities to declare such information suo moto. However, balancing of interests still remains the most fundamental requirement of the objective enforcement of the provisions of the Act of 2005 and for attainment of the real purpose of the Act.

34. The Right to Information, like any other right, is not an unlimited or unrestricted right. It is subject to statutory and constitutional limitations. Section 3 of the Act of 2005 clearly spells out that the right to information is subject to the provisions of the Act. Other provisions require that information must be held by or under the control of public authority besides providing for specific exemptions and the fields to which the provisions of the Act do not apply.

The doctrine of severability finds place in the statute in the shape of Section 10 of the Act of 2005.

35. Neither the Act of 2002 nor the Act of 2005, under its repeal provision, repeals the Official Secrets Act, 1923. The Act of 2005 only repeals the Freedom of Information Act, 2002 in terms of Section 31. It was felt that under the Official Secrets Act, 1923, the entire development process had been shrouded in secrecy and practically the public had no legal right to know as to what process had been followed in designing the policies affecting them and how the programmes and schemes were being implemented. Lack of openness in the functioning of the Government provided a fertile ground for growth of inefficiency and corruption in the working of the public authorities. The Act of 2005 was intended to remedy this widespread evil and provide appropriate links to the government. It was also expected to bring reforms in the environmental, economic and health sectors, which were primarily being controlled by the Government.

36. The Central and State Information Commissions have played a critical role in enforcing the provisions of the Act of 2005, as well as in educating the information seekers and providers about their statutory rights and obligations. Some section of experts opined that the Act of 2005 has been a useful statutory instrument in achieving the goal of providing free and effective information to the citizens as enshrined under Article 19(1)(a) of the Constitution. It is true that democratisation of information and knowledge resources is critical for people's empowerment especially to realise the entitlements as well as to augment opportunities for enhancing the options for improving the quality of life. Still of greater significance is the inclusion of privacy or certain protection in the process of disclosure, under the right to information under the Act. Sometimes, information

ought not to be disclosed in the larger public interest.

37. The courts have observed that when the law making power of a State is restricted by a written fundamental law, then any law enacted, which is opposed to such fundamental law, being in excess of fundamental authority, is a nullity. Inequality is one such example. Still, reasonable classification is permissible under the Indian Constitution. Surrounding circumstances can be taken into consideration in support of the constitutionality of the law which is otherwise hostile or discriminatory in nature, but the circumstances must be such as to justify the discriminatory treatment or the classification, subserving the object sought to be achieved. Mere apprehension of the order being used against some persons is no ground to hold it illegal or unconstitutional particularly when its legality or constitutionality has not been challenged. {Ref. *K. Karunakaran v. State of Kerala and Anr.* MANU/SC/0209/2000 : (2000) 3 SCC 761}. To raise the plea of Article 14 of the Constitution, the element of discrimination and arbitrariness has to be brought out in clear terms. The Courts have to keep in mind that by the process of classification, the State has the power of determining who should be regarded as a class for the purposes of legislation and in relation to law enacted on a particular subject. The power, no doubt, to some degree is likely to produce some inequality but if a law deals with liberties of a number of individuals or well defined classes, it is not open of the charge of denial of equal protection on the ground that has no application to other persons. Classification, thus, means segregation in classes which have a systematic relation usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily, as already noticed. The differentia which is the basis of the classification and the object of the Act are distinct things and what is

necessary is that there must be a nexus between them. The basis of testing constitutionality, particularly on the ground of discrimination, should not be made by raising a presumption that the authorities are acting in an arbitrary manner. No classification can be arbitrary. One of the known concepts of constitutional interpretation is that the legislature cannot be expected to carve out classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned. The Courts would respect the classification dictated by the wisdom of the Legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness tested on the touchstone of Article 14 of the Constitution. {Ref. Welfare Association of Allottees of Residential Premises, Maharashtra V. Ranjit P. Gohil MANU/SC/0129/2003 : (2003) 9 SCC 358}.

38. The rule of equality or equal protection does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programme. So long as the line drawn, by the State is rationally supportable, the Courts will not interpose their judgment as to the appropriate stopping point. A statute is not invalid because it might have gone further than it did, since the legislature need not strike at all evils at the same time and may address itself to the phase of the problem which seemed most acute to the legislative mind. A classification based on experience was a reasonable classification, and that it had a rational nexus to the object thereof and to hold otherwise would be detrimental to the interest of the service itself. This opinion was taken by this Court in the case of *State of UP and Ors. v. J.P. Chaurasia and Ors.* MANU/SC/0502/1988 : (1989) 1 SCC 121. Classification on the basis of educational qualifications made with a view to achieve administrative efficiency cannot be

said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. In the case of *State of Jammu and Kashmir v. Sh. Triloki Nath Khosa and Ors.* MANU/SC/0401/1973 : (1974) 1 SCC 19, it was noted that intelligible differentia and rational nexus are the twin tests of reasonable classification.

39. If the law deals equally with members of a well defined class, it is not open to the charge of denial of equal protection. There may be cases where even a single individual may be in a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others. Still such law can be constitutional. [Ref. *Constructional Law of India* by H.M. Seervai (Fourth Edition) Vol.1]

40. In *Maneka Gandhi v. Union of India and Anr.* MANU/SC/0133/1978 : (1978) 1 SCC 248 and *Charanlal Sahu v. Union of India* (supra), the Court has taken the view that when the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the 'direct and inevitable effect' of such law. A matter within the legislative competence of the legislature has to be left to the discretion and wisdom of the framers, so long as it does not infringe any constitutional provision or violate any fundamental right. The law has to be just, fair and reasonable. Article 14 of the Constitution does not prohibit the prescription of reasonable rules for selection or of qualifications for appointment, except, where the classification is on the face of it, unjust.

41. We have noticed the challenge of the Petitioner to the constitutionality of Section 12(5) and (6) and Section 15(5) and (6) of the Act of 2005. The challenge is made to these provisions stating that the eligibility criteria given therein is vague, does not specify any qualification, and the stated 'experience' has no nexus to the object of the Act. It is also

contended that the classification contemplated under the Act is violative of Article 14 of the Constitution. The Petitioner contends that the legislative power has been exercised in a manner which is not in consonance with the constitutional principles and guarantees and provides for no proper consultative process for appointment. It may be noted that the only distinction between the provisions of, Sections 12(5) and 12(6) on the one hand and Sections 15(5) and 15(6) on the other, is that under Section 12, it is the Central Government who has to make the appointments in consonance with the provisions of the Act, while under Section 15, it is the State Government which has to discharge similar functions as per the specified parameters. Thus, discussion on one provision would sufficiently cover the other as well.

42. Sub-section (5) of Section 12 concerns itself with the eligibility criteria for appointment to the post of the Chief Information Commissioner and Information Commissioners to the Central Information Commission. It states that these authorities shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

43. Correspondingly, Sub-section (6) of Section 12 states certain disqualifications for appointment to these posts. If such person is a Member of Parliament or Member of the legislature of any State or Union Territory or holds any other office of profit or connected with any political party or carrying on any business or pursuing any profession, he would not be eligible for appointment to these posts.

44. In order to examine the constitutionality of these provisions, let us state the parameters which would finally help the Court in determining such questions.

- (a) Whether the law under challenge lacks legislative competence?
- (b) Whether it violates any Article of Part III of the Constitution, particularly, Article 14?
- (c) Whether the prescribed criteria and classification resulting therefrom is discriminatory, arbitrary and has no nexus to the object of the Act?
- (d) Lastly, whether it a legislative exercise of power which is not in consonance with the constitutional guarantees and does not provide adequate guidance to make the law just, fair and reasonable?

45. As far as the first issue is concerned, it is a commonly conceded case before us that the Act of 2005 does not, in any form, lack the legislative competence. In other words, enacting such a law falls squarely within the domain of the Indian Parliament and has so been enacted under Entry 97 (residuary powers) of the Union List. Thus, this issue does not require any discussion.

46. To examine constitutionality of a statute in its correct perspective, we have to bear in mind certain fundamental principles as afore-recorded. There is presumption of constitutionality in favour of legislation. The Legislature has the power to carve out a classification which is based upon intelligible differentia and has rational nexus to the object of the Act. The burden to prove that the enacted law offends any of the Articles under Part III of the Constitution is on the one who questions the constitutionality and shows that despite such presumption in favour of the legislation, it is unfair, unjust and unreasonable.

47. Another most significant canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or *ultra vires* on account of unconstitutionality. The courts would accept an interpretation which would be in favour of the constitutionality, than an approach

which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this Court in its various pronouncements.

48. The provisions of Section 12(5) do not discuss the basic qualification needed, but refer to two components: (a) persons of eminence in public life; and (b) with wide knowledge and experience in the fields stated in the provision. The provision, thus, does not suffer from the infirmity of providing no criteria resulting in the introduction of the element of arbitrariness or discrimination. The provisions require the persons to be of eminence and with knowledge in the stated fields. Knowledge and experience in these fields normally shall be preceded by a minimum requisite qualification prescribed in that field. For example, knowledge and experience in the field of law would presuppose a person to be a law graduate. Similarly, a person with wide knowledge and experience in the field of science and technology would invariably be expected to be at least a graduate or possess basic qualification in science & technology. The vagueness in the expression 'social service', 'mass media' or 'administration and governance' does create some doubt. But, certainly, this vagueness or doubt does not introduce the element of discrimination in the provision. The persons from these various walks of life are considered eligible for appointment to the post of Chief Information Commissioner and Information Commissioners in the respective Information Commissions. This gives a wide zone of consideration and this alleged vagueness can always be clarified by the appropriate government in exercise of its powers under Section 27 and 28 of the Act, respectively.

Constitutional Validity of Section 12(6)

49. Similarly, as stated above, Sub-section (6) of Section 12 creates in a way a disqualification in terms thereof. This provision does have an element of uncertainty and indefiniteness. Upon its proper construction, an issue as to what class of persons are eligible to be appointed to these posts, would unexceptionally arise. According to this provision, a person to be appointed to these posts ought not to have been carrying on any business or pursuing any profession. It is difficult to say what the person eligible under the provision should be doing and for what period. The section does not specify any such period. Normally, the persons would fall under one or the other unacceptable categories. To put it differently, by necessary implication, it excludes practically all classes while not specifying as to which class of persons is eligible to be appointed to that post. The exclusion is too vague, while inclusion is uncertain. It creates a situation of confusion which could not have been the intent of law. It is also not clear as to what classification the framers of the Act intended to lay down. The classification does not appear to have any nexus with the object of the Act. There is no intelligible differentia to support such classification. Which class is intended to be protected and is to be made exclusively eligible for appointment in terms of Sections 12(5) and (6) is something that is not understandable. Wherever, the Legislature wishes to exercise its power of classification, there it has to be a reasonable classification, satisfying the tests discussed above. No Rules have been brought to our notice which even intend to explain the vagueness and inequality explicit in the language of Section 12(6). According to the Petitioner, it tantamounts to an absolute bar because the legislature cannot be stated to have intended that only the persons who are ideal within the terms of Sub-section (6) of

Section 12, would be eligible to be appointed to the post. If we read the language of Sections 12(5) and 12(6) together, the provisions under Sub-section (6) appear to be in conflict with those under Sub-section (5). Sub-section (5) requires the person to have eminence in public life and wide knowledge and experience in the specified field. On the contrary, Sub-section (6) requires that the person should not hold any office of profit, be connected with any political party or carry on any business or pursue any profession. The object of Sub-section (5) stands partly frustrated by the language of Sub-section (6). In other words, Sub-section (6) lacks clarity, reasonable classification and has no nexus to the object of the Act of 2005 and if construed on its plain language, it would result in defeating the provisions of Sub-section (5) of Section 12 to some extent.

50. The legislature is required to exercise its power in conformity with the constitutional mandate, particularly contained in Part III of the Constitution. If the impugned provision denies equality and the right of equal consideration, without reasonable classification, the courts would be bound to declare it invalid. Section 12(6) does not speak of the class of eligible persons, but practically debar all persons from being appointed to the post of Chief Information Commissioner or Information Commissioners at the Centre and State levels, respectively.

51. It will be difficult for the Court to comprehend as to which class of persons is intended to be covered under this clause. The rule of disqualification has to be construed strictly. If anyone, who is an elected representative, in Government service, or one who is holding an office of profit, carrying on any business or profession, is ineligible in terms of Section 12(6), then the question arises as to what class of persons would be eligible? The Section is silent on that behalf.

52. The element of arbitrariness and discrimination is evidenced by the language

of Section 12(6) itself, which can be examined from another point of view. No period has been stated for which the person is expected to not have carried on any business or pursued any profession. It could be one day or even years prior to his nomination. It is not clear as to how the persons falling in either of these classes can be stated to be differently placed. This uncertainty is bound to bring in the element of discrimination and arbitrariness.

53. Having noticed the presence of the element of discrimination and arbitrariness in the provisions of Section 12(6) of the Act, we now have to examine whether this Court should declare this provision *ultra vires* the Constitution or read it down to give it its possible effect, despite the drawbacks noted above. We have already noticed that the Court will normally adopt an approach which is tilted in favour of constitutionality and would prefer reading down the provision, if necessary, by adding some words rather than declaring it unconstitutional. Thus, we would prefer to interpret the provisions of Section 12(6) as applicable post-appointment rather than pre-appointment of the Chief Information Commissioner and Information Commissioners. In other words, these disqualifications will only come into play once a person is appointed as Chief Information Commissioner/Information Commissioner at any level and he will cease to hold any office of profit or carry any business or pursue any profession that he did prior to such appointment. It is thus implicit in this provision that a person cannot hold any of the posts specified in Sub-section (6) of Section 12 simultaneous to his appointment as Chief Information Commissioner or Information Commissioner. In fact, cessation of his previous appointment, business or profession is a condition precedent to the commencement of his appointment as Chief Information Commissioner or Information Commissioner.

Constitutional Validity of Section 12(5)

54. The Act of 2005 was enacted to harmonise the conflicting interests while preserving the paramountcy of the democratic ideal and provide for furnishing of certain information to the citizens who desire to have it. The basic purpose of the Act is to set up a practical regime of right to information for the citizens to secure and access information under the control of the public authorities. The intention is to provide and promote transparency and accountability in the functioning of the authorities. This right of the public to be informed of the various aspects of governance by the State is a pre-requisite of the democratic value. The right to privacy too, is to be protected as both these rival interests find their origin under Article 19(1)(a) of the Constitution. This brings in the need for an effective adjudicatory process. The authority or tribunals are assigned the responsibility of determining the rival contentions and drawing a balance between the two conflicting interests. That is where the scheme, purpose and the object of the Act of 2005 attain greater significance.

55. In order to examine whether Section 12(5) of the Act suffers from the vice of discrimination or inequality, we may discuss the adjudicatory functions of the authorities under the Act in the backdrop of the scheme of the Act of 2005, as discussed above. The authorities who have to perform adjudicatory functions of quasi-judicial content are:

1. The Central/State Public Information Officer;
2. Officers senior in rank to the Central/State Public Information Officer to whom an appeal would lie under Section 19(1) of the Act; and
3. The Information Commission (Central/State) consisting of Chief Information Commissioner and Information Commissioners.

56. In terms of Section 12(5), the Chief Information Commissioner and Information Commissioners should be the persons of eminence in public life with wide knowledge in the prescribed fields. We have already indicated that the terminology used by the legislature, such as 'mass-media' or 'administration and governance', are terms of uncertain tenor and amplitude. It is somewhat difficult to state with exactitude as to what class of persons would be eligible under these categories.

57. The legislature in its wisdom has chosen not to provide any specific qualification, but has primarily prescribed 'wide knowledge and experience' in the cited subjects as the criteria for selection. It is not for the courts to spell out what ought to be the qualifications or experience for appointment to a particular post. Suffices it to say, that if the legislature itself provides 'knowledge and experience' as the basic criteria of eligibility for appointment, this *per se*, would not attract the rigors of Article 14 of the Constitution. On a reasonable and purposive interpretation, it will be appropriate to interpret and read into Section 12(5) that the 'knowledge and experience' in a particular subject would be deemed to include the basic qualification in that subject. We would prefer such an approach than to hold it to be violative of Article 14 of the Constitution. Section 12(5) has inbuilt guidelines to the effect that knowledge and experience, being two distinct concepts, should be construed in their correct perspective. This would include the basic qualification as well as an experience in the respective field, both being the pre-requisites for this section. Ambiguity, if any, resulting from the language of the provision is insignificant, being merely linguistic in nature and, as already noticed, the same is capable of being clarified by framing appropriate rules in exercise of powers of the Central Government under Section 27 of the Act of 2005. We are unable to find that the provisions of Section 12(5) suffer from the vice of arbitrariness or discrimination.

However, without hesitation, we would hasten to add that certain requirements of law and procedure would have to be read into this provision to sustain its constitutionality.

58. It is a settled principle of law, as stated earlier, that courts would generally adopt an interpretation which is favourable to and tilts towards the constitutionality of a statute, with the aid of the principles like 'reading into' and/or 'reading down' the relevant provisions, as opposed to declaring a provision unconstitutional. The courts can also bridge the gaps that have been left by the legislature inadvertently. We are of the considered view that both these principles have to be applied while interpreting Section 12(5). It is the application of these principles that would render the provision constitutional and not opposed to the doctrine of equality. Rather the application of the provision would become more effective.

59. Certainty to vague expressions, like 'social service' and 'mass media', can be provided under the provisions which are capable of being explained by framing of proper rules or even by way of judicial pronouncements. In order to examine the scope of this provision and its ramifications on the other parts of the Act of 2005, it is important to refer back to the scheme of the Act. Under the provisions of the Act, particularly, Sections 4, 12, 18, 19, 20, 22, 23 and 25, it is clear that the Central or State Information Commission, as the case may be, not only exercises adjudicatory powers of a nature no different than a judicial tribunal but is vested with the powers of a civil court as well. Therefore, it is required to decide *lis*, where information is required by a person and its furnishing is contested by the other. The Commission exercises two kinds of penal powers: firstly, in terms of Section 20(1), it can impose penalty upon the defaulters or violators of the provisions of the Act and, secondly, Section 20(2) empowers the Central and the

State Information Commission to conduct an enquiry and direct the concerned disciplinary authority to take appropriate action against the erring officer in accordance with law. Hence, the Commission has powers to pass orders having civil as well as penal consequences. Besides this, the Commission has been given monitoring and recommendatory powers. In terms of Section 23, the jurisdiction of Civil Courts has been expressly barred.

60. Now, let us take an overview of the nature and content of the disputes arising before such Commission. Before the Public Information Officers, the controversy may fall within a narrow compass. But the question before the First Appellate Authority and particularly, the Information Commissioners (Members of the Commission) are of a very vital nature. The impact of such adjudication, instead of being tilted towards administrative adjudication is specifically oriented and akin to the judicial determinative process. Application of mind and passing of reasoned orders are inbuilt into the scheme of the Act of 2005. In fact, the provisions of the Act are specific in that regard. While applying its mind, it has to dwell upon the issues of legal essence and effect. Besides resolving and balancing the conflict between the 'right to privacy' and 'right to information', the Commission has to specifically determine and return a finding as to whether the case falls under any of the exceptions under Section 8 or relates to any of the organizations specified in the Second Schedule, to which the Act does not apply in terms of Section 24. Another significant adjudicatory function to be performed by the Commission is where interest of a third party is involved. The legislative intent in this regard is demonstrated by the language of Section 11 of the Act of 2005. A third party is not only entitled to a notice, but is also entitled to hearing with a specific right to raise objections in relation to the disclosure of information. Such functions, by no stretch of imagination, can be termed

as 'administrative decision' but are clearly in the domain of 'judicial determination' in accordance with the rule of law and provisions of the Act. Before we proceed to discuss this aspect in any further elaboration, let us examine the status of such Tribunal/Commissions and their functions.

B) TRIBUNAL/COMMISSIONS AND THEIR FUNCTIONS:

61. Before dwelling upon determination of nature of Tribunals in India, it is worthwhile to take a brief account of the scenario prevalent in some other jurisdictions of the world.

62. In United Kingdom, efforts have been made for improvising the system for administration of justice. The United Kingdom has a growing human rights jurisprudence, following the enactment of the Human Rights Act, 1998, and it has a well-established ombudsman system. The Tribunals have been constituted to provide specialised adjudication, alongside the courts, to the citizens dissatisfied from the directives made by the Information Commissioners under either of these statutes. The Tribunals, important cogs in the machinery of administration of justice, have recently undergone some major reforms. A serious controversy was raised whether the functioning of these Tribunals was more akin to the Government functioning or were they a part of the Court-attached system of administration of justice. The Donoughmore Committee had used the term 'ministerial tribunals', and had regarded them as part of the machinery of administration. The Franks Report saw their role quite differently:

Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence... appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing

responsibility. Thus, for example, tribunals in the social services field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance.... or on appeal from a decision of a Minister or of an official in a special statutory position.... Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term 'tribunal' in legislation undoubtedly bears this connotation, and the intention of the Parliament to provide for the independence of tribunals is clear and unmistakable.

63. Franks recommended that tribunal chairmen should be legally qualified. This was implemented in respect of some categories of tribunal, but not others. But one of the most interesting issues arising from the Franks exercise is the extent to which the identification of tribunals as part of the machinery of adjudication led the Committee, in making its specific recommendations, down the road of increased legal formality and judicialisation. (Refer: *"The Judicialisation of 'Administrative' Tribunals in the UK: from Hewart to Leggatt"* by Gavin Drewry).

64. In the United Kingdom, the Tribunals, Courts and Enforcement Act, 2007 (for short, the 'TCEA') explicitly confirmed the status of Tribunal Judges (as the legally qualified members of the Tribunals are now called) as part of the independent judicial system, extending to them the same guarantees of independence as apply to the judges in the ordinary courts.

65. From the analysis of the above system of administrative justice prevalent in United

Kingdom, a very subtle and clear distinction from other laws is noticeable in as much as the sensitive personal data and right of privacy of an individual is assured a greater protection and any request for access to such information firstly, is subject to the provisions of the Act and secondly, the members of the Tribunals, who hear the appeals from a rejection of request for information by the Information Commissioners under the provisions of either of these Acts, include persons qualified judicially and having requisite experience as Judges in the regular courts.

66. In United States of America, the statute governing the subject is 'Freedom of Information Act, 1966' (for short, the 'FOIA'). This statute requires each 'agency' to furnish the requisite information to the person demanding such information, subject to the limitations and provisions of the Act. Each agency is required to frame rules. A complainant dissatisfied from non-furnishing of the information can approach the district courts of the United States in the district in which the complainant resides or the place in which the agency records are situated. Such complaints are to be dealt with as per the procedure prescribed and within the time specified under the Act.

67. In New South Wales, under the Privacy and Government Information Legislation Amendment Bill, 2010, amendments were made to both, the Government Information (Public Access) Act, 2009 and the Personal and Privacy Information Act, 1998, to bring the Information Commissioner and the Privacy Commissioner together within a single office. This led to the establishment of the Information and Privacy Commission.

68. On somewhat similar lines is the law prevalent in some other jurisdictions including Australia and Germany, where there exists a unified office of Information and Privacy

Commissioner. In Australia, the Privacy Commissioner was integrated into the office of the Australian Information Commissioner in the year 2010.

69. In most of the international jurisdictions, the Commission or the Tribunals have been treated to be part of the court attached system of administration of justice and as said by the Donoughmore Committee, the 'ministerial tribunals' were different and they were regarded as part of machinery of the administration. The persons appointed to these Commissions were persons of legal background having legally trained mind and judicial experience.

(a) NATURE OF FUNCTION

70. The Information Commission, as a body, performs functions of wide magnitude, through its members, including adjudicatory, supervisory as well as penal functions. Access to information is a statutory right. This right, as indicated above, is subject to certain constitutional and statutory limitations. The Act of 2005 itself spells out exempted information as well as the areas where the Act would be inoperative. The Central and State Information Commissioners have been vested with the power to decline furnishing of an information under certain circumstances and in the specified situations. For disclosure of Information, which involves the question of prejudice to a third party, the concerned authority is required to issue notice to the third party who can make a representation and such representation is to be dealt with in accordance with the provisions of the Act of 2005. This position of law in India is in clear contrast to the law prevailing in some other countries where information involving a third party cannot be disclosed without consent of that party. However, the authority can direct such disclosure, for reasons to be recorded, stating that the public interest outweighs the private

interest. Thus, it involves an adjudicatory process where parties are required to be heard, appropriate directions are to be issued, the orders are required to be passed upon due application of mind and for valid reasons. The exercise of powers and passing of the orders by the authorities concerned under the provisions of the Act of 2005 cannot be arbitrary. It has to be in consonance with the principles of natural justice and the procedure evolved by such authority. Natural justice has three indispensable facets, i.e., grant of notice, grant of hearing and passing of reasoned orders. It cannot be disputed that the authorities under the Act of 2005 and the Tribunals are discharging quasi-judicial functions.

71. In the case of *Indian National Congress (I) v. Institute of Social Welfare and Ors.* MANU/SC/0451/2002 : (2002) 5 SCC 685, the Court explained that where there are two or more parties contesting each other's claim and the statutory authority is required to adjudicate the rival claims between the parties, such a statutory authority can be held to be quasi-judicial and the decision rendered by it as a quasi judicial order. Thus, where there is a lis between the two contesting parties and the statutory authority is required to decide such a dispute, in absence of any other attributes of a quasi-judicial authority, such a statutory authority is a quasi-judicial authority. The legal principles which emerge from the various judgments laying down when an act of a statutory authority would be a quasi-judicial act are that where (a) a statutory authority empowered under a statute to do any act (b) which would prejudicially affect the subject (c) although there is no lis or two contending parties and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial.

72. In other words, an authority is described as quasi judicial when it has some attributes or trappings of judicial provisions but not all. In the matter before us, there is a lis. The request of a party seeking information is allowed or disallowed by the authorities below and is contested by both parties before the Commission. There may also be cases where a third party is prejudicially affected by disclosure of the information requested for. It is clear that the concerned authorities particularly the Information Commission, possess the essential attributes and trappings of a Court. Its powers and functions, as defined under the Act of 2005 also sufficiently indicate that it has adjudicatory powers quite akin to the Court system. They adjudicate matters of serious consequences. The Commission may be called upon to decide how far the right to information is affected where information sought for is denied or whether the information asked for is 'exempted' or impinges upon the 'right to privacy' or where it falls in the 'no go area' of applicability of the Act. It is not mandatory for the authorities to allow all requests for information in a routine manner. The Act of 2005 imposes an obligation upon the authorities to examine each matter seriously being fully cautious of its consequences and effects on the rights of others. It may be a simple query for information but can have far reaching consequences upon the right of a third party or an individual with regard to whom such information is sought. Undue inroad into the right to privacy of an individual which is protected under Article 21 of the Constitution of India or any other law in force would not be permissible. In *Gobind v. State of Madhya Pradesh and Anr.* MANU/SC/0119/1975 : (1975) 2 SCC 148 this Court held that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. In *Ram Jethmalani and*

Ors. v. Union of India MANU/SC/0711/2011 : (2011) 8 SCC 1 this Court has observed that the right to privacy is an integral part of the right to life. Thus, the decision making process by these authorities is not merely of an administrative nature. The functions of these authorities are more aligned towards the judicial functions of the courts rather than mere administrative acts of the State authority.

73. 'Quasi judicial' is a term which may not always be used with utmost clarity and precision. An authority which exercises judicial functions or functions analogous to the judicial authorities would normally be termed as 'quasi-judicial'. In the '*Advanced Law Lexicon*' (3rd Edn., 2005) by P. Ramanathan Aiyar, the expression 'quasi judicial' is explained as under:

Of, relating to, or involving an executive or administrative official's adjudicative acts. Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by Courts. (Blacm, 7th Edn., 1999)

'Quasi-judicial is a term that is.... Not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency - the test is the nature of the tribunal rather than what it is doing. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by the law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination may be set aside, but it is not sufficient to show that the administration is biased in favour of a certain policy, or that the evidence points to a different conclusion..' (George Whitecross Paton, *A Textbook of Jurisprudence* 336 (G.W. Paton & Davit P Derham eds., 4th ed. (1972)

Describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law (*Oxford Law Dictionary 5th Edn. 2003*)

When the law commits to an officer the duty of looking into certain facts not in a way which it specially directs, but after a discretion in its nature judicial, the function is quasi judicial.

Of or relating to the adjudicative acts of an executive or administrative officials.

Sharing the qualities of and approximating to what is judicial; essentially judicial in character but not within the judicial power or function nor belonging to the judiciary as constitutionally defined. [Section 128(2)(i), Code of Civil Procedure (5 of 1908)].

74. This Court in the case of *State of Himachal Pradesh and Ors. v. Raja Mahendra Pal and Anr.* MANU/SC/1092/1995 : 1995 Supp (2) SCC 731, held that the expression 'quasi judicial' has been termed to be one which stands midway a judicial and an administrative function. If the authority has any express statutory duty to act judicially in arriving at the decision in question, it would be deemed to be quasi-judicial. Where the function to determine a dispute is exercised by virtue of an executive discretion rather than the application of law, it is a quasi-judicial function. A quasi-judicial act requires that a decision is to be given not arbitrarily or in mere discretion of the authority but according to the facts and circumstances of the case as determined upon an enquiry held by the authority after giving an opportunity to the affected parties of being heard or wherever necessary of leading evidence in support of their contention. The authority and the Tribunal constituted under the provisions of the Act of 2005 are certainly

quasi-judicial authority/tribunal performing judicial functions.

75. Under the scheme of the Act of 2005, in terms of Section 5, every public authority, both in the State and the Centre, is required to nominate Public Information Officers to effectuate and make the right to information a more effective right by furnishing the information asked for under this Act. The Information Officer can even refuse to provide such information, which order is appealable under Section 19(1) to the nominated senior officer, who is required to hear the parties and decide the matter in accordance with law. This is a first appeal. Against the order of this appellate authority, a second appeal lies with the Central Information Commission or the State Information Commission, as the case may be, in terms of Section 19(3) of the Act of 2005. The Legislature, in its wisdom, has provided for two appeals. Higher the adjudicatory forum, greater is the requirement of adherence to the rule of judiciousness, fairness and to act in accordance with the procedure prescribed and in absence of any such prescribed procedure, to act in consonance with the principles of natural justice. Higher also is the public expectation from such tribunal. The adjudicatory functions performed by these bodies are of a serious nature. An order passed by the Commission is final and binding and can only be questioned before the High Court or the Supreme Court in exercise of the Court's jurisdiction under Article 226 and/or Article 32 of the Constitution, respectively.

76. If one analyses the scheme of the Act of 2005 and the multifarious functions that the Information Commission is expected to discharge in its functioning, following features become evident:

1. It has a *lis* pending before it which it decides. '*Lis*', as per Black's Law Dictionary

(8th Edition) means 'a piece of litigation; a controversy or a dispute'. One party asserting the right to a particular information, the other party denying the same or even contesting that it was invasion into his protected right gives rise to a *lis* which has to be adjudicated by the Commission in accordance with law and, thus, cannot be termed as 'administrative function' *simpliciter*. It, therefore, becomes evident that the appellate authority and the Commission deal with *lis* in the sense it is understood in the legal parlance.

2. It performs adjudicatory functions and is required to grant opportunity of hearing to the affected party and to record reasons for its orders. The orders of the Public Information Officer are appealable to first appellate authority and those of the First Appellate Authority are appealable to the Information Commission, which are then open to challenge before the Supreme Court or the High Court in exercise of its extraordinary power of judicial review.
3. It is an adjudicatory process not akin to administrative determination of disputes but similar in nature to the judicial process of determination. The concerned authority is expected to decide not only whether the case was covered under any of the exceptions or related to any of the organizations to which the Act of 2005 does not apply, but even to determine, by applying the legal and constitutional provisions, whether the exercise of the right to information amounted to invasion into the right to privacy. This being a very fine distinction of law, application of legal principles in such cases becomes very significant.

4. The concerned authority exercises penal powers and can impose penalty upon the

defaulters as contemplated under Section 20 of the Act of 2005. It has to perform investigative and supervisory functions. It is expected to act in consonance with the principles of natural justice as well as those applicable to service law jurisprudence, before it can make a report and recommend disciplinary action against the defaulters, including the persons in service in terms of Section 20(2).

5. The functioning of the Commission is quite in line with the functioning of the civil courts and it has even expressly been vested with limited powers of the civil Court. Exercise of these powers and discharge of the functions discussed above not only gives a colour of judicial and/or quasi-judicial functioning to these authorities but also vests the Commission with the essential trappings of a civil Court.

77. Let us now examine some other pre-requisites of vital significance in the functioning of the Commission. In terms of Section 22 of this Act, the provisions of the Act are to be given effect to, notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. This Act is, therefore, to prevail over the specified Acts and even instruments. The same, however, is only to the extent of any inconsistency between the two. Thus, where the provisions of any other law can be applied harmoniously, without any conflict, the question of repugnancy would not arise.

78. Further, Section 23 is a provision relating to exclusion of jurisdiction of the Courts. In terms of this Section, no Court shall entertain any suit, application or other proceedings in respect of any order made under this Act and no such order shall be called in question otherwise

than by way of an appeal provided for under this Act. In other words, the jurisdiction of the Court has been ousted by express language. Nevertheless, it is a settled principle of law that despite such excluding provision, the extraordinary jurisdiction of the High Court and the Supreme Court, in terms of Articles 226 and 32 of the Constitution, respectively, cannot be divested. It is a jurisdiction incapable of being eroded or taken away by exercise of legislative power, being an important facet of the basic structure of the Constitution. In the case of *L. Chandra Kumar* (supra), the Court observed that the constitutional safeguards which ensure independence of the Judges of the superior judiciary not being available for the Members of the Tribunal, such tribunals cannot be considered full and effective substitute to the superior judiciary in discharging the function of constitutional interpretation. They can, however, perform a supplemental role. Thus, all decisions of the Tribunals were held to be subject to scrutiny before the High Court under Article 226/ 227 of the Constitution. Therefore, the orders passed by the authority, i.e., the Central or the State Information Commissions under the Act of 2005 would undoubtedly be subject to judicial review of the High Court under Article 226/227 of the Constitution.

79. Section 24 of the Act of 2005 empowers the Central Government to make amendments to the Second Schedule specifying such organization established by the Government to which the Act of 2005 would not apply. The 'appropriate Government' [as defined in Section 2(a)] and the 'competent authority' [as defined in Section 2(e)] have the power to frame rules for the purposes stated under Sections 27 and 28 of the Act of 2005. This exercise is primarily to carry out the provisions of the Act of 2005.

80. Once it is held that the Information Commission is essentially quasi-judicial in nature, the Chief information Commissioner

and members of the Commission should be the persons possessing requisite qualification and experience in the field of law and/or other specified fields. We have discussed in some detail the requirement of a judicial mind for effectively performing the functions and exercising the powers of the Information Commission. In the case of *Bharat Bank Ltd., Delhi v. Employees of Bharat Bank and Ors.* MANU/SC/0030/1950 : 1950 SCR 459: AIR 1950 SC 188, this Court took the view that the functions and duties of the Industrial Tribunal are very much like those of a body discharging judicial functions, although it is not a court in the technical sense of the word. In *S.P. Sampath Kumar v. Union of India* MANU/SC/0851/1987 : (1987) 1 SCC 124, again this Court held that in the case of Administrative Tribunals, the presence of a Judicial member was the requirement of fair procedure of law and the Administrative Tribunal must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. It was also observed that we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity. But what is needed in a judicial tribunal which is intended to supplant the High Court is legal training and experience. Similar view was also expressed in the case of *Union of India v. Madras Bar Association* (2010) 11 SCC 1.

81. Further, in the case of *L. Chandra Kumar* (supra) where this Court was concerned with the orders and functioning of the Central Administrative Tribunal and scope of its judicial review, while holding that the jurisdiction of the High Court under Article 226 of the Constitution was open and could not be excluded, the Court specifically emphasised on the need for a legally trained mind and experience in law

for the proper functioning of the tribunal. The Court held as under:

88. Functioning of Tribunals

XXX XXX XXX

8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. *Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach.* When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such tribunal. (*See S.P. Sampath Kumar v. Union of India.*) The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. *It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself.* Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach,

predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid.

82. In India, the Central or the State Information Commission, as the case may be, is vested with dual jurisdiction. It is the appellate authority against the orders passed by the first appellate authority, the Information Officer, in terms of Section 19(1) of the Act of 2005, while additionally it is also a supervisory and investigative authority in terms of Section 18 of the Act wherein it is empowered to hear complaints by any person against the inaction, delayed action or other grounds specified under Section 18(1) against any State and Central Public Information Officer. This inquiry is to be conducted in accordance with the prescribed procedure and by exercising the powers conferred on it under Section 18(3). It has to record its satisfaction that there exist reasonable grounds to enquire into the matter.

83. Section 20 is the penal provision. It empowers the Central or the State Information Commission to impose penalty as well as to recommend disciplinary action against such Public Information Officers who, in its opinion, have committed any acts or omissions specified in this section, without any reasonable cause. The above provisions demonstrate that the functioning of the Commission is not administrative *simpliciter* but is quasi-judicial in nature. It exercises powers and functions which are adjudicatory in character and legal in nature. Thus, the requirement of law, legal procedures, and the protections would

apparently be essential. The finest exercise of quasi-judicial discretion by the Commission is to ensure and effectuate the right of information recognized under Article 19 of the Constitution vis-à-vis the protections enshrined under Article 21 of the Constitution.

84. The Information Commission has the power to deal with the appeals from the First Appellate Authority and, thus, it has to examine whether the order of the appellate authority and even the Public Information Officer is in consonance with the provisions of the Act of 2005 and limitations imposed by the Constitution. In this background, no Court can have any hesitation in holding that the Information Commission is akin to a Tribunal having the trappings of a civil Court and is performing quasi-judicial functions.

85. The various provisions of this Act are clear indicators to the unquestionable proposition of law that the Commission is a judicial tribunal and not a ministerial tribunal. It is an important cog in and is part of court attached system of administration of justice unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to machinery of administration.

(b) REQUIREMENT OF LEGAL MIND

86. Now, it will be necessary for us to dwell upon somewhat controversial but an aspect of greater significance as to who and by whom such adjudicatory machinery, at its various stages under the provisions of the Act of 2005 particularly in the Indian context, should be manned.

87. Section 5 of the Act of 2005 makes it obligatory upon every public authority to designate as many officers, as Central Public Information Officers and State Information Public Officers in all administrative units or offices, as may be necessary to provide information to the persons requesting

information under the Act of 2005. Further, the authority is required to designate Central Assistant Public Information Officer and State Assistant Public Information Officer at the sub-divisional or sub-district level. The Assistant Public Information Officers are to perform dual functions - (1) to receive the applications for information; and (2) to receive appeals under the Act. The applications for information are to be forwarded to the concerned Information Officer and the appeals are to be forwarded to the Central Information Commission or the State Information Commission, as the case may be. It was contemplated that these officers would be designated at all the said levels within hundred days of the enactment of the Act. There is no provision under the Act of 2005 which prescribes the qualification or experience that the Information Officers are required to possess. In fact, the language of the Section itself makes it clear that any officer can be designated as Central Public Information Officer or State Public Information Officer. Thus, no specific requirement is mandated for designating an officer at the sub-divisional or sub-district level. The appeals, under Section 19(1) of the Act, against the order of the Public Information Officer are to be preferred before an Officer senior in the rank to the Public Information Officer. However, under Section 19(3), a further appeal lies to the Central or the State Information Commission, as the case may be, against the orders of the Central or State Appellate Officer. These officers are required to dispose of such application or appeal within the time schedule specified under the provisions of the Act. There is also no qualification or experience required of these designated officers to whom the first appeal would lie. However, in contradistinction, Section 12(5) and Section 15(5) provide for the experience and knowledge that the Chief Information Commissioner and the Information Commissioners at the

Centre and the State levels, respectively, are required to possess. This provision is obviously mandatory in nature.

88. As already noticed, in terms of Section 12(5), the Chief Information Commissioner and Information Commissioners are required to be persons of eminence in public life with wide knowledge and experience in law, science and technology or any of the other specified fields. Further, Sub-section (6) of Sections 12 and 15 lays down the disqualifications for being nominated as such. It is provided that the Chief Information Commissioner or Information Commissioners shall not be a Member of Parliament or Member of the Legislative Assembly of any State or Union Territory or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

89. The requirement of legal person in a quasi-judicial body has been internationally recognized. We have already referred, amongst others, to the relevant provisions of the respective Information Acts of the USA, UK and Canada. Even in the Canadian Human Rights Tribunal, under the Canadian Human Rights Act, the Vice-Chairman and Members of the Tribunal are required to have a degree in law from a recognized university and be the member of the bar of a province or a Chamber *des notaires du Quebec* for at least 10 years. Along with this qualification, such person needs to have general knowledge of human rights law as well as public law including Administrative and Constitutional Laws. The Information Commissioner under the Canadian Law has to be appointed by the Governor in Council after consultation with the leader of every recognized party in the Senate and the House of Commons. Approval of such appointment is done by resolution of the Senate and the House of Commons. It is noted that the Vice-

Chairperson plays a preeminent role within this Administrative Tribunal by ensuring a fair, timely and impartial adjudication process for human rights complaints, for the benefit of all concerned.

90. As already noticed, in the United Kingdom, the Information Rights Tribunal and the Information Commissioners are to deal with the matters arising from both, the FOIA as well as the Data Protection Act, 1998. These tribunals are discharging quasi-judicial functions. Appointments to them are dealt with and controlled by the TCEA. These appointments are treated as judicial appointments and are covered under Part 2 of the TCEA. Section 50 provides for the eligibility conditions for judicial appointment. Section 50(1)(b) refers to a person who satisfies the judicial-appointment eligibility condition on an N-year basis. A person satisfies that condition on N-year basis if (a) the person has a relevant qualification and (b) the total length of the person's qualifying periods is at least N years. Section 52 provides for the meaning of the expression 'gain experience in law' appearing in Section 50(3)(b). It states that a person gains experience in law during a period if the period is one during which the person is engaged in law-related activities. The essence of these statutory provisions is that the concerned person under that law is required to possess both a degree as well as experience in the legal field. Such experience inevitably relates to working in that field. Only then, the twin criteria of requisite qualification and experience can be satisfied.

91. It may be of some relevance here to note that in UK, the Director in the office of the Government Information Service, an authority created under the Freedom of Information Act, 2000 possesses a degree of law and has been a member of the Bar of the District of Columbia and North Carolina in UK. The Principal Judge of

Information Rights Jurisdiction in the First-tier Tribunal, not only had a law degree but were also retired solicitors or barristers in private practice.

92. Thus, there exists a definite requirement for appointing persons to these posts with legal background and acumen so as to ensure complete faith and confidence of the public in the independent functioning of the Information Commission and for fair and expeditious performance of its functions. The Information Commissions are required to discharge their functions and duties strictly in accordance with law.

93. In India, in terms of Sub-section (5), besides being a person of eminence in public life, the necessary qualification required for appointment as Chief Information Commissioner or Information Commissioner is that the person should have wide knowledge and experience in law and other specified fields. The term 'experience in law' is an expression of wide connotation. It presupposes that a person should have the requisite qualification in law as well as experience in the field of law. However, it is worthwhile to note that having a qualification in law is not equivalent to having experience in law and vice-versa. 'Experience in law', thus, is an expression of composite content and would take within its ambit both the requisite qualification in law as well as experience in the field of law. A person may have some experience in the field of law without possessing the requisite qualification. That certainly would not serve the requirement and purpose of the Act of 2005, keeping in view the nature of the functions and duties required to be performed by the Information Commissioners. Experience in absence of basic qualification would certainly be insufficient in its content and would not satisfy the requirements of the said provision. Wide knowledge in a particular

field would, by necessary implication, refer to the knowledge relatable to education in such field whereas experience would necessarily relate to the experience attained by doing work in such field. Both must be read together in order to satisfy the requirements of Sections 12(5) of and 15(5) the Act of 2005. Similarly, wide knowledge and experience in other fields would have to be construed as experience coupled with basic educational qualification in that field.

94. Primarily it may depend upon the language of the rules which govern the service but it can safely be stated as a rule that experience in a given post or field may not necessarily satisfy the condition of prescribed qualification of a diploma or a degree in such field. Experience by working in a post or by practice in the respective field even for long time cannot be equated with the basic or the prescribed qualification. In absence of a specific language of the provision, it is not feasible for a person to have experience in the field of law without possessing a degree in law. In somewhat different circumstances, this Court in the case of *State of Madhya Pradesh v. Dharam Bir* MANU/SC/0397/1998 : (1998) 6 SCC 165, while dealing with Rule 8(2) of the Madhya Pradesh Industrial Training (Gazetted) Service Recruitment Rules, 1985, took the view that the stated qualification for the post of Principal Class I or Principal Class II were also applicable to appointment by promotion and that the applicability of such qualification is not restricted to direct appointments. Before a person becomes eligible for being promoted to the post of Principal, Class II or Principal, Class-I, he must possess a Degree or Diploma in Engineering, as specified in the Schedule. The fact that the person had worked as a Principal for a decade would not lead to a situation of accepting that the person was qualified to hold the post. The Court held as under:

32. “Experience” gained by the Respondent on account of his working on the post in question for over a decade cannot be equated with educational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government.

33. The post in question is the post of Principal of the Industrial Training Institute. The Government has prescribed a Degree or Diploma in Engineering as the essential qualification for this post. No one who does not possess this qualification can be appointed on this post. The educational qualification has a direct nexus with the nature of the post. The Principal may also have an occasion to take classes and teach the students. A person who does not hold either a Degree or Diploma in Engineering cannot possibly teach the students of the Industrial Training Institute the technicalities of the subject of Engineering and its various branches.

95. Thus, in our opinion, it is clear that experience in the respective field referred to in Section 12(5) of the Act of 2005 would be an experience gained by the person upon possessing the basic qualification in that field. of course, the matter may be somewhat different where the field itself does not prescribe any degree or appropriate course. But it would be applicable for the fields like law, engineering, science and technology, management, social service and journalism, etc.

96. This takes us to discuss the kind of duties and responsibilities that such high

post is expected to perform. Their functions are adjudicatory in nature. They are required to give notice to the parties, offer them the opportunity of hearing and pass reasoned orders. The orders of the appellate authority and the Commission have to be supported by adequate reasoning as they grant relief to one party, despite opposition by the other or reject the request for information made in exercise of a statutory right.

97. It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are required to pass reasoned orders. In this regard, reference can be made to the judgments of this Court in the cases of *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr.* MANU/SC/0211/1976 : (1976) 2 SCC 981; and *Assistant Commissioner, Commercial Tax Department Works Contract and Leasing, Kota v. Shukla and Brothers* MANU/SC/0258/2010 : (2010) 4 SCC 785.

98. The Chief Information Commissioner and members of the Commission are required to possess wide knowledge and experience in the respective fields. They are expected to be well versed with the procedure that they are

to adopt while performing the adjudicatory and quasi judicial functions in accordance with the statutory provisions and the scheme of the Act of 2005. They are to examine whether the information required by an applicant falls under any of the exemptions stated under Section 8 or the Second Schedule of the Act of 2005. Some of the exemptions under Section 8, particularly, Sub-sections (e), (g) and (j) have been very widely worded by the Legislature keeping in mind the need to afford due protection to privacy, national security and the larger public interest. In terms of Section 8(1) (e), (f), (g), (h) and (i), the authority is required to record a definite satisfaction whether disclosure of information would be in the larger public interest or whether it would impede the process of investigation or apprehension or prosecution of the offenders and whether it would cause unwarranted invasion of the privacy of an individual. All these functions may be performed by a legally trained mind more efficaciously. The most significant function which may often be required to be performed by these authorities is to strike a balance between the application of the freedom guaranteed under Article 19(1)(a) and the rights protected under Article 21 of the Constitution. In other words, the deciding authority ought to be conscious of the constitutional concepts which hold significance while determining the rights of the parties in accordance with the provisions of the statute and the Constitution. The legislative scheme of the Act of 2005 clearly postulates passing of a reasoned order in light of the above. A reasoned order would help the parties to question the correctness of the order effectively and within the legal requirements of the writ jurisdiction of the Supreme Court and the High Courts.

99. 'Persons of eminence in public life' is also an expression of wide implication and ramifications. It takes in its ambit all requisites

of a good citizen with values and having a public image of contribution to the society. Such person should have understanding of concepts of public interest and public good. Most importantly, such person should have contributed to the society through social or allied works. The authorities cannot lose sight of the fact that ingredients of institutional integrity would be applicable by necessary implication to the Commissions and their members. This discussion safely leads us to conclude that the functions of the Chief Information Commissioner and Information Commissioners may be better performed by a legally qualified and trained mind possessing the requisite experience. The same should also be applied to the designation of the first appellate authority, i.e., the senior officers to be designated at the Centre and State levels. However, in view of language of Section 5, it may not be necessary to apply this principle to the designation of Public Information Officer.

100. Moreover, as already noticed, the Information Commission, is performing quasi-judicial functions and essence of its adjudicatory powers is akin to the Court system. It also possesses the essential trappings of a Court and discharges the functions which have immense impact on the rights/obligations of the parties. Thus, it must be termed as a judicial Tribunal which requires to be manned by a person of judicial mind, expertise and experience in that field. This Court, while dealing with the cases relating to the powers of the Parliament to amend the Constitution has observed that every provision of the Constitution, can be amended provided in the result, the basic structure of the Constitution remains the same. The dignity of the individual secured by the various freedoms and basic rights contained in Part III of the Constitution and their protection itself has been treated as the basic structure of the Constitution.

101. Besides separation of powers, the independence of judiciary is of fundamental constitutional value in the structure of our Constitution. Impartiality, independence, fairness and reasonableness in judicial decision making are the hallmarks of the Judiciary. If 'Impartiality' is the soul of Judiciary, Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive, as this Court stated in the case of *Union of India v. R. Gandhi, President, Madras Bar Association* (2010) 11 SCC 17.

102. The independence of judiciary stricto sensu applies to the Court system. Thus, by necessary implication, it would also apply to the tribunals whose functioning is quasi-judicial and akin to the court system. The entire administration of justice system has to be so independent and managed by persons of legal acumen, expertise and experience that the persons demanding justice must not only receive justice, but should also have the faith that justice would be done.

103. The above detailed analysis leads to an ad libitum conclusion that under the provisions and scheme of the Act of 2005, the persons eligible for appointment should be of public eminence, with knowledge and experience in the specified fields and should preferably have a judicial background. They should possess judicial acumen and experience to fairly and effectively deal with the intricate questions of law that would come up for determination before the Commission, in its day-to-day working. The Commission satisfies abecedarians of a judicial tribunal which has the trappings of a court. It will serve the ends of justice better, if the Information Commission was manned by persons of legal expertise and with adequate experience in the field of adjudication. We may further clarify that such judicial members could work individually or in Benches of two, one being

a judicial member while the other being a qualified person from the specified fields to be called an expert member. Thus, in order to satisfy the test of constitutionality, we will have to read into Section 12(5) of the Act that the expression 'knowledge and experience' includes basic degree in that field and experience gained thereafter and secondly that legally qualified, trained and experienced persons would better administer justice to the people, particularly when they are expected to undertake an adjudicatory process which involves critical legal questions and niceties of law. Such appreciation and application of legal principles is a *sine qua non* to the determinative functioning of the Commission as it can tilt the balance of justice either way. *Malcolm Gladwell* said, "the key to good decision making is not knowledge. It is understanding. We are swimming in the former. We are lacking in the latter". The requirement of a judicial mind for manning the judicial tribunal is a well accepted discipline in all the major international jurisdictions with hardly any exceptions. Even if the intention is to not only appoint people with judicial background and expertise, then the most suitable and practical resolution would be that a 'judicial member' and an 'expert member' from other specified fields should constitute a Bench and perform the functions in accordance with the provisions of the Act of 2005. Such an approach would further the mandate of the statute by resolving the legal issues as well as other serious issues like an inbuilt conflict between the Right to Privacy and Right to Information while applying the balancing principle and other incidental controversies. We would clarify that participation by qualified persons from other specified fields would be a positive contribution in attainment of the proper administration of justice as well as the object of the Act of 2005. Such an approach

would help to withstand the challenge to the constitutionality of Section 12(5).

104. As a natural sequel to the above, the question that comes up for consideration is as to what procedure should be adopted to make appointments to this august body. Section 12(3) states about the High-powered Committee, which has to recommend the names for appointment to the post of Chief Information Commissioner and Information Commissioners to the President. However, this Section, and any other provision for that matter, is entirely silent as to what procedure for appointment should be followed by this High Powered Committee. Once we have held that it is a judicial tribunal having the essential trappings of a court, then it must, as an irresistible corollary, follow that the appointments to this august body are made in consultation with the judiciary. In the event, the Government is of the opinion and desires to appoint not only judicial members but also experts from other fields to the Commission in terms of Section 12(5) of the Act of 2005, then it may do so, however, subject to the riders stated in this judgment. To ensure judicial independence, effective adjudicatory process and public confidence in the administration of justice by the Commission, it would be necessary that the Commission is required to work in Benches. The Bench should consist of one judicial member and the other member from the specified fields in terms of Section 12(5) of the Act of 2005. It will be incumbent and in conformity with the scheme of the Act that the appointments to the post of judicial member are made 'in consultation' with the Chief Justice of India in case of Chief Information Commissioner and members of the Central Information Commission and the Chief Justices of the High Courts of the respective States, in case of the State Chief Information Commissioner and State Information Commissioners of that State Commission. In the case of appointment of

members to the respective Commissions from other specified fields, the DoPT in the Centre and the concerned Ministry in the States should prepare a panel, after due publicity, empanelling the names proposed at least three times the number of vacancies existing in the Commission. Such panel should be prepared on a rational basis, and should inevitably form part of the records. The names so empanelled, with the relevant record should be placed before the said High Powered Committee. In furtherance to the recommendations of the High Powered Committee, appointments to the Central and State Information Commissions should be made by the competent authority. Empanelment by the DoPT and other competent authority has to be carried on the basis of a rational criteria, which should be duly reflected by recording of appropriate reasons. The advertisement issued by such agency should not be restricted to any particular class of persons stated under Section 12(5), but must cover persons from all fields. Complete information, material and comparative data of the empanelled persons should be made available to the High Powered Committee. Needless to mention that the High Powered Committee itself has to adopt a fair and transparent process for consideration of the empanelled persons for its final recommendation. This approach, is in no way innovative but is merely derivative of the mandate and procedure stated by this Court in the case of *L. Chandra Kumar* (supra) wherein the Court dealt with similar issues with regard to constitution of the Central Administrative Tribunal. All concerned are expected to keep in mind that the Institution is more important than an individual. Thus, all must do what is expected to be done in the interest of the institution and enhancing the public confidence. A three Judge Bench of this Court in the case of *Centre for PIL and Anr. v. Union of India and Anr.* MANU/SC/0179/2011 : (2011) 4 SCC 1 had also

adopted a similar approach and with respect we reiterate the same.

105. Giving effect to the above scheme would not only further the cause of the Act but would attain greater efficiency, and accuracy in the decision-making process, which in turn would serve the larger public purpose. It shall also ensure greater and more effective access to information, which would result in making the invocation of right to information more objective and meaningful.

106. For the elaborate discussion and reasons afore-recorded, we pass the following order and directions:

1. The writ petition is partly allowed.
2. The provisions of Sections 12(5) and 15(5) of the Act of 2005 are held to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, it is necessary for the Court to 'read into' these provisions some aspects without which these provisions are bound to offend the doctrine of equality. Thus, we hold and declare that the expression 'knowledge and experience' appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, without any peradventure and veritably, we state that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice by the Commission. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working of the Commission. This is the obvious interpretation of the language

- of these provisions and, in fact, is the essence thereof.
3. As opposed to declaring the provisions of Section 12(6) and 15(6) unconstitutional, we would prefer to read these provisions as having effect 'post-appointment'. In other words, cessation/termination of holding of office of profit, pursuing any profession or carrying any business is a condition precedent to the appointment of a person as Chief Information Commissioner or Information Commissioner at the Centre or State levels.
 4. There is an absolute necessity for the legislature to reword or amend the provisions of Section 12(5), 12(6) and 15(5), 15(6) of the Act. We observe and hope that these provisions would be amended at the earliest by the legislature to avoid any ambiguity or impracticability and to make it in consonance with the constitutional mandates.
 5. We also direct that the Central Government and/or the competent authority shall frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law. Such rules should be framed with particular reference to Section 27 and 28 of the Act within a period of six months from today.
 6. We are of the considered view that it is an unquestionable proposition of law that the Commission is a 'judicial tribunal' performing functions of 'judicial' as well as 'quasi-judicial' nature and having the trappings of a Court. It is an important cog and is part of the court attached system of administration of justice, unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to the machinery of administration.
 7. It will be just, fair and proper that the first appellate authority (i.e. the senior officers to be nominated in terms of Section 5 of the Act of 2005) preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law.
 8. The Information Commissions at the respective levels shall henceforth work in Benches of two members each. One of them being a 'judicial member', while the other an 'expert member'. The judicial member should be a person possessing a degree in law, having a judicially trained mind and experience in performing judicial functions. A law officer or a lawyer may also be eligible provided he is a person who has practiced law at least for a period of twenty years as on the date of the advertisement. Such lawyer should also have experience in social work. We are of the considered view that the competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners. Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India.
 9. The appointment of the judicial members to any of these posts shall be made 'in consultation' with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be.
 10. The appointment of the Information Commissioners at both levels should be made from amongst the persons empanelled by the DoPT in the case of Centre and the concerned Ministry in the case of a State. The panel has to be prepared upon due advertisement and on a rational basis as afore-recorded.

11. The panel so prepared by the DoPT or the concerned Ministry ought to be placed before the High-powered Committee in terms of Section 12(3), for final recommendation to the President of India. Needless to repeat that the High Powered Committee at the Centre and the State levels is expected to adopt a fair and transparent method of recommending the names for appointment to the competent authority.
12. The selection process should be commenced at least three months prior to the occurrence of vacancy.
13. This judgment shall have effect only prospectively.
14. Under the scheme of the Act of 2005, it is clear that the orders of the Commissions are subject to judicial review before the High Court and then before the Supreme Court of India. In terms of Article 141 of the Constitution, the judgments of the Supreme Court are law of the land and are binding on all courts and tribunals. Thus,

it is abundantly clear that the Information Commission is bound by the law of precedence, i.e., judgments of the High Court and the Supreme Court of India. *In order to maintain judicial discipline and consistency in the functioning of the Commission, we direct that the Commission shall give appropriate attention to the doctrine of precedence and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case.*

It is not only the higher court's judgments that are binding precedents for the Information Commission, but even those of the larger Benches of the Commission should be given due acceptance and enforcement by the smaller Benches of the Commission. *The rule of precedence is equally applicable to intra appeals or references in the hierarchy of the Commission.*

107. The writ petition is partly allowed with the above directions, however, without any order as to costs.

IN THE SUPREME COURT OF INDIA

Writ Petition (Crl) Nos. 35, 137, 138, 142, 220 and 249 of 2011, 11 and 14 of 2012 and S.L.P. (Crl) Nos. 1909 and 1938 of 2011 and 2442 and 2091-2092 of 2012

Decided On: 10.07.2012

Appellants: **Subhash Popatlal Dave**

Vs.

Respondent: **Union of India (UOI) and Anr.**

Hon'ble Judges:

Altamas Kabir, Gyan Sudha Misra and J. Chelameswar, JJ.

Subject: Constitution

JUDGMENT

Altamas Kabir, J.

1. These Special Leave Petitions and Writ Petitions are all directed against orders of preventive detention at the pre-execution stage. During the course of hearing, it was submitted on behalf of some of the Petitioners that the decision rendered in Addl. Secretary, Govt. of India v. Alka Subhash Gadia MANU/SC/0552/1992 : (1992) Supp. (1) SCC 496 that a preventive detention order could be challenged at the pre-execution stage on the five grounds enumerated in the judgment, was no longer good law on account of the subsequent enactment of the Right to Information Act, 2005, hereinafter referred to as the "R.T.I. Act", which came into force on 15th June, 2005. A connected question which was raised was whether the aforesaid decision in Alka Subhash Gadia's case (supra) was per incuriam, since it did not have the occasion to notice subsequent decisions on the same question. Another question which was raised was whether the five instances indicated in Alka Subhash Gadia's case (supra), under which a detention order could be challenged at the pre-execution stage, was exhaustive or whether they were only illustrative.

2. Since a decision on the points raised could effectively decide the matters without going into factual details, it was decided to decide the said questions as preliminary issues, before going into the matters on merit.

3. Appearing on behalf of some of the Petitioners, Mr. Mukul Rohatgi, learned Senior Advocate, urged that the five exceptions laid down in Alka Subhash Gadia's case (supra) were not exhaustive, but only illustrative, as was held by this Court in Deepak Bajaj v. State of Maharashtra (2008) 16 SCC 14. Mr. Rohatgi submitted that it was well settled that the power of judicial review vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution, is part of the basic structure of the Constitution and it was inconceivable that such power of judicial review could be restricted by amending the Constitution or by a judicial pronouncement.

4. Mr. Rohatgi contended that since Article 32 was included in Part III of the Constitution and was in itself a fundamental right, the exercise of jurisdiction there under by this Court could not be affected and/or restricted by the decision rendered in Alka Subhash Gadia's case (supra). Learned Counsel urged that it was also inconceivable that by a judicial pronouncement, the jurisdiction of this Court to interfere with detention orders at a pre-execution stage only could be restricted to the five exceptions mentioned in Alka Subhash Gadia's case (supra) only, for all times to come.

5. Tracing the history of the powers exercised by this Court under Article 32 of the Constitution, Mr. Rohatgi firstly referred to the decision rendered by this Court in the case of *Romesh Thappar v. State of Madras* MANU/SC/0006/1950 : (1950) SCR 594, wherein it was observed that Article 32 provides a guaranteed remedy for the enforcement of the rights under Part III of the Constitution and this remedial right has itself been made a fundamental right by being included in Part III. Mr. Rohatgi then referred to the decision of this Court in *D.A.V. College v. State of Punjab* (1972) 2 SCC 269, wherein in paragraph 44, this Court observed that it was immaterial as to whether any fundamental right has been threatened or violated. So long as a prima facie case of such threat and violation was made out, a petition under Article 32 has to be entertained.

6. Various other judgments were also referred to by Mr. Rohatgi, of which it will be worthwhile to refer to the decision of this Court in *Haradhan Saha v. State of West Bengal* MANU/SC/0419/1974 : (1975) 3 SCC 198, *Olga Tellis and Ors. v. Bombay Municipal Corporation* MANU/SC/0039/1985 : (1985) 3 SCC 545 and *K.K. Kochunni v. State of Madras* (1959) Supp. (2) SCR 316. All these judgments have held that judicial review of administrative action, even when fundamental rights are threatened, is permitted on grounds of relevance, reasonableness, necessity, delay, casualness and for infringement of Articles 14, 19 and 21. In fact, it was in *K.K. Kochunni's* case (supra) that it was observed by the Constitution Bench that the right to enforce a fundamental right conferred by the Constitution was itself a fundamental right guaranteed by Article 32 of the Constitution and this Court could not refuse to entertain a petition under that Article simply because the Petitioner had/might have any other alternative legal remedy. The said position was further reiterated by another Constitution Bench in *Haradhan Saha's* case

(supra), while dealing with a case involving preventive detention. It was observed that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done, but to prevent him from doing it again. It was also observed that there could be no parallel between prosecution in a Court of law and a detention order under the Act. While one is punitive, the other is preventive. Also referring to the decision of this Court in *Francis Coralie Mullin v. W.C. Khambra* MANU/SC/0260/1980 : (1980) 2 SCC 275, Mr. Rohatgi referred to the observations made in paragraph 5 of the judgment to the effect that the role of the Court in cases of preventive detention has to be one of eternal vigilance as no freedom is higher than personal freedom and no duty higher than to maintain it unimpaired. Furthermore, the Court's writ is the ultimate insurance against illegal detention and a detenu was, therefore, entitled to question the detention order even at the pre-execution stage, as was held in *Alka Subhash Gadia's* case (supra), on grounds other than those set out therein.

(6) In support of his submission that circumstances had substantially changed on account of the advent of information technology, Mr. Rohatgi submitted that this Court had occasion to consider the challenge against orders of preventive detention on grounds outside those indicated in *Alka Subhash Gadia's* case (supra), wherein this Court had intervened and quashed the orders of detention on grounds, other than those indicated in *Alka Subhash Gadia's* case (supra).

7. In this connection, Mr. Rohatgi firstly referred to the decision of this Court in *Rajinder Arora v. Union of India* MANU/SC/1437/2006 : (2006) 4 SCC 796, wherein this Court had held that the delay in passing of a detention order, without any explanation for such delay, was sufficient ground to set aside the detention order made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act,

1974. of course, it must be said that while quashing the detention order, Their Lordships related the facts of the said case with grounds 3 and 4 of the decision in Alka Subhash Gadia's case (supra). Reference was thereafter made by Mr. Rohatgi to a Three-Judge Bench decision of this Court, in which two of us (Altamas Kabir and J. Chelameswar, JJ) were parties, in the case of Yumman Ongbi Lembi Leima v. State of Manipur MANU/SC/0004/2012 : (2012) 2 SCC 176, in which the detention order was quashed, inter alia, on the ground that there was no proximate and live link between the activities of the detenu and the detention order. In the said matter, facts relating to the arrest of the detenu and subsequent release on bail more than 12 years before the offence in respect of which detention orders had been passed, were held to be irrelevant and/or improper for justification of an order of detention. Mr. Rohatgi pointed out that it was also held therein that mere apprehension that the detenu was likely to be released on bail, where after he would indulge in further prejudicial activities, was not sufficient to justify the detention order in the absence of any other ground.

8. The next decision referred to by Mr. Rohatgi was delivered by a Bench of three Judges of this Court in Rekha v. State of Tamil Nadu MANU/SC/0366/2011 : (2011) 5 SCC 244, wherein while disagreeing with some of the observations made in Haradhan Saha's case (supra), the Hon'ble Judges went on to hold that though in Haradhan Saha's case it had been held that the authorities could take recourse to both criminal proceedings and also preventive detention, it did not mean that such would be the law in all cases, even though in the view of the Court the criminal proceedings were sufficient to deal with the offences.

9. Having completed his submissions with regard to the exhaustive and/or illustrative nature of the five exceptions set out in Alka Subhash Gadia's case (supra), Mr. Rohatgi then turned his focus on the provisions of the

R.T.I. Act under which, according to Learned Counsel, a detenu was entitled to receive a copy of the grounds of detention even though he had not been actually apprehended and detained pursuant to such detention order. Mr. Rohatgi submitted that in the cases of Choith Nanikram Harchandai and Suresh Hotwani, the grounds of detention had been provided to the detenu under the provisions of Section 3 of the aforesaid Act. Learned Counsel submitted that the only prohibition to the grant of information has been set out in Section 8(h) and Section 24 of the said Act. Section 8(h) of the R.T.I. Act prohibits the disclosure of information which could impede the process of investigation or the apprehension and prosecution of offenders. Mr. Rohatgi submitted that it is obvious that the said provisions were confined to persons who are offenders and not detenus under a preventive detention law, who could not under the detention order be said to be an offender. Mr. Rohatgi urged that the only other restriction was Under Section 24, wherein certain security and intelligence agencies of the Government have been exempted from the provisions of the Act. Learned Counsel urged that under the first proviso to Section 24, information relating to human rights cannot be denied to the person seeking information since human rights had been defined in Section 2(e) of the Protection of Human Rights Act as being rights relating to life, liberty, equality and dignity, guaranteed by the Constitution. Mr. Rohatgi contended that the illegal detention would also amount to violation of human rights.

10. Mr. Rohatgi submitted that the Right to Information Act was not in existence, when decisions were rendered by this Court in Alka Subhash Gadia's case (supra) as also in the case of Sayed Taher Bawamiya v. Joint Secretary, Government of India MANU/SC/2749/2000 : (2000) 8 SCC 630 and in the case of Union of India v. Atam Prakash and Anr. MANU/SC/8305/2008 : (2009) 1 SCC 585, in which it was held that the grounds of challenge to a

detention order at the pre-execution stage could only be confined to the five exceptions set out in Alka Subhash Gadia's case (supra).

11. Mr. Rohatgi submitted that having regard to the various circumstances which this Court had no occasion to consider in Alka Subhash Gadia's case (supra), it cannot be accepted that the challenge to preventive detention order at the pre-execution stage could not be made on any other ground other than the five exceptions mentioned in Alka Subhash Gadia's case (supra). Mr. Rohatgi urged that besides the above, the right of a detenu to information relating to the grounds of detention Under Section 3 of the Right to Information Act, 2005, was also a circumstance which could not be taken into consideration by the Hon'ble Judges while deciding Alka Subhash Gadia's case (supra). Accordingly, in the changed circumstances, it cannot be held that apart from the five exceptions mentioned in Alka Subhash Gadia's case (supra), a detenu could not be denied the grounds of detention on the basis of which he was to be detained at the pre-execution stage.

12. In addition to the submissions made by Mr. Rohatgi, submissions were also advanced by Mr. Ravindra Keshavrao Adsure, Advocate, appearing for some of the Petitioners in these matters. In fact, Mr. Adsure is appearing in the lead matter, namely, Writ Petition (Crl.) No. 137 of 2011, filed by Subhash Popatlal Dave, in which the detention order made against one Haresh Kalyandas Bhavsar on 18th August, 1997, was challenged. Mr. Adsure attempted to convince this Court that the decisions cited in Alka Subhash Gadia's case (supra) and Sayed Taher Bawamiya's case (supra), were per incuriam, since the Hon'ble Judges did not have the opportunity to consider the effects of the enactment of the Right to Information Act in 2005. Mr. Adsure made special mention of the Writ Petitions filed by Choith Nanikram Harchandai (Writ Petition (Crl) No. 88 of 2010) and Suresh Hotwani and Anr. (Writ Petition (Crl) No. 35 of 2011), wherein the detention orders

and grounds had been provided under the R.T.I. Act, 2005, before the same were executed. Following the same line of arguments advanced by Mr. Rohatgi, Mr. Adsure also laid stress on the observations made in Alka Subhash Gadia's case (supra) (paragraph 12) where other than the five exceptions ultimately culled out in paragraph 30 of the judgment, various other situations entertaining a petition for quashing of detention order have also been indicated. Mr. Adsure also referred to the decisions of this Court in (i) Alpesh Navinchandra Shah v. State of Maharashtra MANU/SC/7160/2007 : (2007) 2 SCC 777; (ii) State of Maharashtra v. Bhaurao Punjabrao Gawande MANU/SC/7275/2008 : (2008) 3 SCC 613; and (iii) Rekha v. State of Tamil Nadu MANU/SC/0366/2011 : (2011) 5 SCC 244, wherein the detention orders were set aside on the ground that the purpose for issuance of a detention order is to prevent the detenu from continuing his prejudicial activities for a period of one year, but not to punish him for something done in the remote past. Mr. Adsure contended that the very concept of preventive detention is to prevent a person from indulging in activities which were prejudicial to the State and society. However, there would have to be a nexus between the detention order and the alleged offence in respect whereof he was to be detained and in the absence of a live link between the two, the detention order could not be defended.

13. On the same lines, Mr. Adsure referred to the decision in Rekha's case (supra), wherein this Court had held that when the ordinary criminal law of the land is able to deal with a situation, then recourse to preventive detention law will be illegal. Mr. Adsure urged that the orders of detention which violated the aforesaid principles could not, therefore, be sustained and could also be challenged at the pre-execution stage.

14. Appearing on behalf of the Union of India, learned Additional Solicitor General, Mr. P.P. Malhotra, contended in response to

the first point raised, that the grounds for intervention at the pre-detention stage, as indicated in Alka Subhash Gadia's case (supra), are exhaustive and not illustrative, and had been so held in subsequent decisions of this Court, and in particular, the decision of a Three-Judge Bench in the case of Sayed Taher Bawamiya (supra). The learned ASG contended that in the said case it had also been sought to be argued that the exceptions in Alka Subhash Gadia's case (supra) were not exhaustive, but merely illustrative, but the Three-Judge Bench had rejected such contention upon holding that in Alka Subhash Gadia's case (supra), it is only in the five types of instances indicated, that the Courts may exercise its discretion and jurisdiction under Article 226 and 32 of the Constitution at the pre-execution stage. The learned ASG laid stress on the observations made in paragraph 7 of the judgment wherein the learned Judges had observed that in Alka Subhash Gadia's case (supra) it was only in the five types of instances that the Courts could exercise its discretion and jurisdiction at the pre-execution stage. Reference was also made to another Three-Judge Bench decision of this Court in Naresh Kumar Goyal v. Union of India MANU/SC/2493/2005 : (2005) 8 SCC 276, wherein it was, inter alia, observed that the refusal by the Courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground, does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

15. The learned ASG also referred to the decision of this Court in Union of India v. Parasmal Rampuria MANU/SC/0215/1998 : (1998) 8 SCC 402, wherein this Court directed the detenu to surrender and thereafter to make a representation challenging the detention order, which could be examined on merits. The entire focus of the submissions made by the

learned ASG was centered around the decision in Sayed Taher Bawamiya's case (supra) and he tried to make a distinction between the same and the decision in Deepak Bajaj's case (supra), which the learned ASG pointed out, was a decision of two Judges of this Court. Even with regard to the decision in Rajinder Arora's case (supra), the learned ASG pointed out that the decision was based on ground Nos. 3 and 4 of the decision in Alka Subhash Gadia's case (supra).

16. As to the decision in Rekha's case (supra), the learned ASG pointed out that this was not a case of pre-detention, but a criminal appeal in which the orders of detention had been challenged. The learned ASG submitted that since the challenge was not at the pre-execution stage, the judgment in Rekha's case was not relevant in deciding the issue involved in this case.

17. As to the other decisions cited on behalf of the Petitioners, such as in Romesh Thappar's case (supra) and in K.K. Kochunni's case (supra), the learned ASG submitted that the said decisions relate to the width and scope of Articles 19 and 21 of the Constitution and there was no challenge therein that the decision in Alka Subhash Gadia's case (supra) was erroneous.

18. On the second point relating to applicability of the R.T.I. Act, 2005, the learned ASG submitted that while the Preamble to the Act stipulates that it had been passed to promote transparency and accountability in the working of every public authority, certain restrictions had been imposed on divulging certain information as indicated in Section 8 of the Act. Referring to Clause (a) of Section 8 of the aforesaid Act, the learned ASG submitted that it had been stipulated that notwithstanding anything contained in the Act, there would be no obligation to any citizen to give information, disclosure of which would prejudicially affect the economic interest of the State, relations

with foreign States or such information which would impede the process of investigation or the apprehension or prosecution of offenders. The learned ASG also pointed out that there was no obligation to provide information which relates to personal information, the disclosure of which has no relationship to any public activity or interest. While referring to Section 24 of the Act, the learned ASG submitted that it guaranteed exemption to the agencies mentioned in the 2nd Schedule and the Central Economic Intelligence Bureau was one of them. Therefore, if a proposed detenu or his representative made an application for disclosure of grounds of detention, he would not be entitled to the same on the aforesaid grounds.

19. The learned ASG submitted that the decision rendered by the Bombay High Court in dismissing the Writ Petitions filed by Suresh Hotwani and Nitesh Ashok Sadarangani did not require any interference by this Court. The learned ASG lastly submitted that the provisions in the Constitution for detention are provided in Article 22 which sets out the provisions regarding protection against arrest and detention in certain cases. The learned ASG laid special stress on Clause (b) of Sub-clause (3), which indicates that nothing in Clauses (1) and (2) would apply to any person who is arrested or detained under any law providing for preventive detention. Regarding Sub-clause (5) of the aforesaid Article, the learned ASG submitted that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order is under an obligation to communicate to such person the grounds on which the order has been made, as quickly as possible, in order to afford him the earliest opportunity of making a representation against such order. The learned ASG submitted that detention or arrest was a pre-condition for service of the grounds of detention and it is only after such detention or arrest that a detenu could ask

for a copy of the grounds of detention. The learned ASG submitted that the constitutional provisions would have an overriding effect over the Right to Information Act, and, accordingly, the submissions made both by Mr. Rohtagi and Mr. Adsure with regard to the right of a detenu to ask for grounds of detention under the R.T.I. Act was without any substance and was liable to be rejected. The learned ASG submitted that both the grounds raised on behalf of the Petitioners, as preliminary grounds, were not valid and were liable to be rejected.

20. On the other question as to whether the R.T.I. Act applies in cases of preventive detention, we are unable to accept the submissions made by Mr. Rohatgi. Article 22 of the Constitution provides for protection against arrest and detention in certain cases. Clauses (1) and (2) of Article 22 set out the manner in which a person arrested is to be dealt with and Clause (1) makes it clear that no person who is arrested is to be detained in custody without being informed, as soon as may be, of the grounds for such arrest. Clause (2) provides that such a person who is arrested and detained in custody has to be produced before a Magistrate within a period of 24 hours of such arrest. However, an exception is made by Clause (3), which provides that nothing in Clauses (1) and (2) shall apply, amongst others, to any person who is arrested or detained under any law providing for preventive detention. Clause (4) thereafter sets out that no law providing for preventive detention shall authorize such detention for more than three months without following the procedure subsequently set out. What is relevant for our consideration while deciding the above mentioned question is Clause (5) of Article 22 which is extracted herein below:

(5). When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest

opportunity of making a representation against the order.

21. It may immediately be noticed from the opening words of Clause (5) that the grounds on which the person is detained is to be communicated to him when the person **has actually been detained.** (emphasis supplied) If one were to read Clauses (1) to (6) of Article 22 as a whole, it is more than obvious that the scheme envisaged therein provides for the protection of a person arrested in connection with an offence by providing for his production before the Magistrate within 24 hours of his arrest and also to avail the services of a lawyer, but an exception has been carved out in relation to detention effected under preventive detention laws. A detenu is not required to be treated in the same manner as a person arrested in connection with the commission of an alleged offence. On the other hand, preventive detention laws provide for the detention of a person with the intention of preventing him from committing similar offences in the future, at least for a period of one year. Section 3 of the R.T.I. Act, 2005, provides that subject to the provisions of the Act, all citizens would have the right to information. Section 8, however, makes an exemption from disclosure of information. While setting out the instances in which there would be no obligation to give any citizen information in the situations enumerated in Sub-section (1), Sub-section (2) provides that notwithstanding anything in the Official Secrets Act, 1923, nor any of the exemptions permissible in accordance with Sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. There are two instances, which one can think of among the exemptions identified in Sub-section (1), of which one is the exemption indicated in Clause (a) of Sub-section (1), which reads as follows:

8 (1). Notwithstanding anything contained in this Act, there shall be no obligation to give

any citizen,-

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) to (i) xxx xxx xxx

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

22. Even under Sub-section (1) of Section 8 of the above Act, the legislature made an exception to the disclosure of information which could be contrary to the interests of the nation, subject to the provision that such information may also be allowed to be accessed in the public interest, which outweighed the personal interests of the citizen. Not much discourse is required with regard to the primacy of the provisions of the Constitution, vis-à-vis the enactments of the legislature. It is also not necessary to emphasise the fact that the provisions of the Constitution will prevail over any enactment of the legislature, which itself is a creature of the Constitution. Since Clause (5) of Article 22 provides that the grounds for detention are to be served on a detenu after his detention, the provisions of Section 3 of the R.T.I. Act, 2005, cannot be applied to cases relating to preventive detention at the pre-execution stage. In other words, Section 3 of the R.T.I. Act has to give way to the provisions of Clause (5) of Article 22 of

the Constitution. Even the provisions relating to production of an arrested or detained person, contained in Clauses (1) and (2) of Article 22 of the Constitution, have in their application been excluded in respect of a person detained under any preventive detention law.

23. We, therefore, agree with the learned ASG, Mr. P.P. Malhotra, that notwithstanding the provisions of the R.T.I. Act, 2005, the State is not under any obligation to provide the grounds of detention to a detenu prior to his arrest and detention, notwithstanding the fact that in the cases of Choith Nanikram Harchandai and Suresh Hotwani and Anr., referred to hereinabove, the grounds of detention had been provided to the detenu under the R.T.I. Act, 2005, at the pre-execution stage. The procedure followed under the R.T.I. Act, in respect of the said writ petitions cannot and should not be treated as a precedent in regard to Mr. Rohatgi's contention that under the R.T.I. Act, 2005, a detenu was entitled, in assertion of his human rights, to receive the grounds under which he was to be detained, even before his detention, at the pre-execution stage.

24. As to the second point urged by Mr. Rohtagi as to whether the five exceptions mentioned in Alka Subhash Gadia's case (*supra*) regarding the right to challenge an order of detention at the pre-execution stage, were exhaustive or not, we are of the view that the matter requires consideration. The decision in Alka Subhash Gadia's case (*supra*), appears to suggest several things at the same time. The Three-Judge Bench, while considering the challenge to the detention order passed against the detenu, at the pre-execution stage, and upholding the contention that such challenge was maintainable, also sought to limit the scope of the circumstances in which such challenge could be made. However, before arriving at their final conclusion on the said point, the learned Judges also considered the provisions of Articles 19 to 22 relating to

fundamental freedoms conferred on citizens and the proposition that the fundamental rights under Chapter III of the Constitution have to be read as a part of an integrated scheme. Their Lordships emphasized that they were not mutually exclusive, but operated, and were subject to each other. Their Lordships held that it was not enough that the detention order must satisfy the tests of all the said rights so far as they were applicable to individual cases. Their Lordships also emphasized in particular that it was well-settled that Article 22(5) is not the sole repository of the detenu's rights. His rights are also governed by the other fundamental rights, particularly those enshrined in Articles 14, 19 and 21 of the Constitution and the nature of constitutional rights there under. Their Lordships were of the view that read together the Articles indicate that the Constitution permits both punitive and preventive detention, provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it are valid. Going on to consider the various decisions rendered by this Court in this regard, Their Lordships in paragraph 5 observed as follows:

(5) The neat question of law that falls for consideration is whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it. As a corollary to this question, the incidental question that has to be answered is whether the detenu or the Petitioner on his behalf, as the case may be, is entitled to the detention order and the grounds on which the detention order is made before the detenu submits to the order.

25. It is in the aforesaid background that Their Lordships while examining the various decisions rendered on the subject, summed up the discussion in paragraph 30 of the judgment, wherein Their Lordships again reiterated that neither the Constitution, including the provisions of Article 22 thereof, nor the Act in

question, places any restriction on the powers of the High Court and this Court to review judicially the order of detention. Their Lordships observed that the powers under Article 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive action resulting in civil or criminal consequences. However, the said observations were, thereafter, somewhat whittled down by the subsequent observation that the Courts have over the years evolved certain self-restraints in exercising these powers. Such self-imposed restraints were not confined to the review of the orders passed under detention law only, but they extended to orders passed and decisions made under all laws. It was also observed that in pursuance of such self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person should first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary and equitable jurisdiction under Articles 226 and 32 respectively and that such jurisdiction by its very nature has to be used sparingly and in circumstances where no other efficacious remedy is available. However, having held as above, Their Lordships also observed that all the self-imposed restrictions in respect of detention orders would have to be respected as it would otherwise frustrate the very purpose for which such detention orders are passed for a limited purpose. Consequently, in spite of upholding the jurisdiction of the Court to interfere with such orders even at the pre-execution stage, Their Lordships went on to observe as follows:

The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope

and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

26. Nowhere has it been indicated that challenge to the detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the Courts could interfere with an order of detention at the pre-execution stage, with the expression “viz”, Their Lordships possibly never intended that the said five examples were to be exclusive. In common usage or parlance the expression “viz” means “in other words”. There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplar and not exclusive. On the other hand, the Hon’ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of said power. It is only in Sayed Taher Bawamiya’s case (supra) that another Three-Judge Bench considered the ratio of the decision of this Court in Alka Subhash Gadia’s case (supra) and observed that the Courts have the power in appropriate cases to interfere with the detention orders at the pre-execution stage, but that the scope of interference was very limited. It was in such context that the Hon’ble Judges observed that while the detention orders could be challenged

at the pre-execution stage, that such challenge could be made only after being prima facie satisfied that the five exceptions indicated in Alka Subhash Gadia's case (supra) had been fulfilled.

27. Their Lordships in paragraph 7 of the judgment held that the case before them did not fall under any of the five exceptions to enable the Court to interfere. Their Lordships also rejected the contention that the exceptions were not exhaustive and that the decision in Alka Subhash Gadia's case (supra) indicated that it is only in the five types of instances indicated in the judgment in Alka Subhash Gadia's case (supra) that the Courts may exercise its discretionary jurisdiction under Articles 226 and 32 of the Constitution at the pre-execution stage.

28. With due respect to the Hon'ble Judges, we have not been able to read into the judgment in Alka Subhash Gadia's case (supra) any intention on the part of the Hon'ble Judges, who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. Both the State and the Hon'ble Judges relied on the decision in Sayed Taher Bawamiya's case (supra). As submitted by Mr. Rohatgi, to accept that it was the intention of the Hon'ble Judges in Alka Subhash Gadia's case (supra) to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the Court of law. Such powers are untrammelled and vested in the superior

Courts to protect all citizens and even non-citizens, under the Constitution, and may require further examination.

29. In such circumstances, while rejecting Mr. Rohatgi's contention regarding the right of a detenu to be provided with the grounds of detention prior to his arrest, we are of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case (supra), requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which were not before the Hon'ble Judges deciding Alka Subhash Gadia's case (supra). Law is never static but dynamic, and to hold otherwise, would prevent the growth of law, especially in matters involving the right of freedom guaranteed to a citizen under Article 19 of the Constitution, which is sought to be taken away by orders of preventive detention, where a citizen may be held and detained not to punish him for any offence, but to prevent him from committing such offence. As we have often repeated, the most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra caution and not as an alternative to the ordinary laws of the land.

30. In the light of the above, let the various Special Leave Petitions and the Writ Petitions be listed for final hearing and disposal on 7th August, 2012 at 3.00 p.m. This Bench be reconstituted on the said date, for the aforesaid purpose.

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 10787-10788 of 2011 (Arising out of S.L.P. (C) Nos. 32768-32769/2010)

Decided On: 12.12.2011

Appellants: **Chief Information Commr. and Anr.**

Vs.

Respondent: **State of Manipur and Anr.**

Hon'ble Judges:

Asok Kumar Ganguly and Gyan Sudha Misra, JJ.

Subject: Right to Information JUDGMENT

Asok Kumar Ganguly, J.

1. Leave granted.

2. These appeals have been filed by the Chief Information Commissioner, Manipur and one Mr. Wahangbam Joykumar impugning the judgment dated 29th July 2010 passed by the High Court in Writ Appeal Nos. 11 and 12 of 2008 in connection with two Writ Petition No. 733 of 2007 and Writ Petition No. 478 of 2007. The material facts giving rise to the controversy in this case can be summarized as follows:

3. Appellant No. 2 filed an application dated 9th February, 2007 under Section 6 of the Right to Information Act ('Act') for obtaining information from the State Information Officer relating to magisterial enquiries initiated by the Govt. of Manipur from 1980-2006. As the application under Section 6 received no response, Appellant No. 2 filed a complaint under Section 18 of the Act before the State Chief Information Commissioner, who by an order dated 30th May, 2007 directed Respondent No. 2 to furnish the information within 15 days. The said direction was challenged by the State by filing a Writ Petition.

4. The second complaint dated 19th May, 2007 was filed by the Appellant No. 2 on 19th May, 2007 for obtaining similar information for the

period between 1980 - March 2007. As no response was received this time also, Appellant No. 2 again filed a complaint under Section 18 and the same was disposed of by an order dated 14th August, 2007 directing disclosure of the information sought for within 15 days. That order was also challenged by way of a Writ Petition by the Respondents.

5. Both the Writ Petitions were heard together and were dismissed by a common order dated 16th November, 2007 by learned Single Judge of the High Court by inter alia upholding the order of the Commissioner. The Writ Appeal came to be filed against both the judgments and were disposed of by the impugned order dated 29th July 2010. By the impugned order, the High Court held that under Section 18 of the Act the Commissioner has no power to direct the Respondent to furnish the information and further held that such a power has already been conferred under Section 19(8) of the Act on the basis of an exercise under Section 19 only. The Division Bench further came to hold that the direction to furnish information is without jurisdiction and directed the Commissioner to dispose of the complaints in accordance with law.

6. Before dealing with controversy in this case, let us consider the object and purpose of the Act and the evolving mosaic of jurisprudential thinking which virtually led to its enactment in 2005.

7. As its preamble shows the Act was enacted to promote transparency and accountability in the working of every public authority in order

to strengthen the core constitutional values of a democratic republic. It is clear that the Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable. The Act is meant to harmonise the conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal.

8. The preamble would obviously show that the Act is based on the concept of an open society.

9. On the emerging concept of an 'open Government', about more than three decades ago, the Constitution Bench of this Court in The State of Uttar Pradesh v. Raj Narain and Ors. MANU/SC/0032/1975 : AIR 1975 SC 865 speaking through Justice Mathew held:

...The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. ...To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired.

(para 74, page 884)

10. Another Constitution Bench in S.P. Gupta and Ors. v. President of India and Ors. MANU/SC/0080/1981 : AIR 1982 SC 149 relying on the ratio in Raj Narain (supra) held:

...The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech

and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest...

(para 66, page 234)

11. It is, therefore, clear from the ratio in the above decisions of the Constitution Bench of this Court that the right to information, which is basically founded on the right to know, is an intrinsic part of the fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution. The said Act was, thus, enacted to consolidate the fundamental right of free speech.

12. In Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. v. Cricket Association of Bengal and Ors. MANU/SC/0246/1995 : (1995) 2 SCC 161, this Court also held that right to acquire information and to disseminate it is an intrinsic component of freedom of speech and expression. (See para 43 page 213 of the report).

13. Again in Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. and Ors. MANU/SC/0412/1988 : (1988) 4 SCC 592 this Court recognised that the Right to Information is a fundamental right under Article 21 of the Constitution.

14. This Court speaking through Justice Sabyasachi Mukharji, as His Lordship then was, held:

...We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to

live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.

(para 34, page 613 of the report)

15. In People's Union for Civil Liberties and Anr. v. Union of India and Ors. MANU/SC/0019/2004 : (2004) 2 SCC 476 this Court reiterated, relying on the aforesaid judgments, that right to information is a facet of the right to freedom of 'speech and expression' as contained in Article 19(1)(a) of the Constitution of India and also held that right to information is definitely a fundamental right. In coming to this conclusion, this Court traced the origin of the said right from the Universal Declaration of Human Rights, 1948 and also Article 19 of the International Covenant on Civil and Political Rights, which was ratified by India in 1978. This Court also found a similar enunciation of principle in the Declaration of European Convention for the Protection of Human Rights (1950) and found that the spirit of the Universal Declaration of 1948 is echoed in Article 19(1) (a) of the Constitution. (See paras 45, 46 and 47 at page 495 of the report)

16. The exercise of judicial discretion in favour of free speech is not only peculiar to our jurisprudence, the same is a part of the jurisprudence in all the countries which are governed by rule of law with an independent judiciary. In this connection, if we may quote what Lord Acton said in one of his speeches:

Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.

17. It is, therefore, clear that a society which adopts openness as a value of overarching significance not only permits its citizens a wide range of freedom of expression, it also goes further in actually opening up the deliberative

process of the Government itself to the sunlight of public scrutiny.

18. Justice Frankfurter also opined:

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.

19. Actually the concept of active liberty, which is structured on free speech, means sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. and a sharing of sovereign authority suggests intimate correlation between the functioning of the Government and common man's knowledge of such functioning.

(Active Liberty by Stephen Breyer - page 15)

20. However, while considering the width and sweep of this right as well as its fundamental importance in a democratic republic, this Court is also conscious that such a right is subject to reasonable restrictions under Article 19(2) of the Constitution.

21. Thus note of caution has been sounded by this Court in Dinesh Trivedi, M.P. and Ors. v. Union of India and Ors. MANU/SC/1138/1997 : (1997) 4 SCC 306 where it has been held as follows:

...Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realize that undue popular pressure brought to bear on decision makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is

transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to maintain a fine balance which would serve public interest.

(para 19, page 314)

22. The Act has six Chapters and two Schedules. Right to Information has been defined under Section 2(j) of the Act to mean as follows:

(j) 'right to information' means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-

- (i) inspection of work, documents, records;
- (ii) taking notes, extracts, or certified copies of documents or records;
- (iii) taking certified samples of material;
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

23. Right to Information has also been statutorily recognised under Section 3 of the Act as follows:

3. Right to information.- Subject to the provisions of this Act, all citizens shall have the right to information.

24. Section 6 in this connection is very crucial. Under Section 6 a person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed. Such request may be made to the Central Public Information Officer or State Public Information

Officer, as the case may be, or to the Central Assistant Public Information Officer or State Assistant Public Information Officer. In making the said request the applicant is not required to give any reason for obtaining the information or any other personal details excepting those which are necessary for contacting him.

25. It is quite interesting to note that even though under Section 3 of the Act right of all citizens, to receive information, is statutorily recognised but Section 6 gives the said right to any person. Therefore, Section 6, in a sense, is wider in its ambit than Section 3.

26. After such a request for information is made, the primary obligation of consideration of the request is of the Public Information Officer as provided under Section 7. Such request has to be disposed of as expeditiously as possible. In any case within 30 days from the date of receipt of the request either the information shall be provided or the same may be rejected for any of the reasons provided under Sections 8 and 9. The proviso to Section 7 makes it clear that when it concerns the life or liberty of a person, the information shall be provided within forty-eight hours of the receipt of the request. Sub-section (2) of Section 7 makes it clear that if the Central Public Information Officer or the State Public Information Officer, as the case may be, fails to give the information, specified in Sub-section (1), within a period of 30 days it shall be deemed that such request has been rejected. Sub-section (3) of Section 7 provides for payment of further fees representing the cost of information to be paid by the person concerned. There are various Sub-sections in Section 7 with which we are not concerned. However, Sub-section (8) of Section 7 is important in connection with the present case. Sub-section (8) of Section 7 provides:

(8) Where a request has been rejected under Sub-section (1), the Central Public Information Officer or State Public Information Officer, as the case may be shall communicate to the person making the request,-

- (i) The reasons for such rejection;
- (ii) the period within which an appeal against such rejection may be preferred; and
- (iii) the particulars of the appellate authority.

27. Sections 8 and 9 enumerate the grounds of exemption from disclosure of information and also grounds for rejection of request in respect of some items of information respectively. Section 11 deals with third party information with which we are not concerned in this case.

28. The question which falls for decision in this case is the jurisdiction, if any, of the Information Commissioner under Section 18 in directing disclosure of information. In the impugned judgment of the Division Bench, the High Court held that the Chief Information Commissioner acted beyond his jurisdiction by passing the impugned decision dated 30th May, 2007 and 14th August, 2007. The Division Bench also held that under Section 18 of the Act the State Information Commissioner is not empowered to pass a direction to the State Information Officer for furnishing the information sought for by the complainant.

29. If we look at Section 18 of the Act it appears that the powers under Section 18 have been categorized under clauses (a) to (f) of Section 18(1). Under clauses (a) to (f) of Section 18(1) of the Act the Central Information Commission or the State Information Commission, as the case may be, may receive and inquire into complaint of any person who has been refused access to any information requested under this Act (Section 18(1)(b)) or has been given incomplete, misleading or false information under the Act (Section 18(1)(e)) or has not been given a response to a request for information or access to information within time limits specified under the Act (Section 18(1)(c)). We are not concerned with provision of Section 18(1)(a) or 18(1)(d) of the Act. Here we are concerned with the residuary provision under Section 18(1)(f) of the Act. Under Section 18(3) of the Act the Central Information Commission

or State Information Commission, as the case may be, while inquiring into any matter in this Section has the same powers as are vested in a civil court while trying a suit in respect of certain matters specified in Section 18(3)(a) to (f). Under Section 18(4) which is a non-obstante clause, the Central Information Commission or the State Information Commission, as the case may be, may examine any record to which the Act applies and which is under the control of the public authority and such records cannot be withheld from it on any ground.

30. It has been contended before us by the Respondent that under Section 18 of the Act the Central Information Commission or the State Information Commission has no power to provide access to the information which has been requested for by any person but which has been denied to him. The only order which can be passed by the Central Information Commission or the State Information Commission, as the case may be, under Section 18 is an order of penalty provided under Section 20. However, before such order is passed the Commissioner must be satisfied that the conduct of the Information Officer was not bona fide.

31. We uphold the said contention and do not find any error in the impugned judgment of the High court whereby it has been held that the Commissioner while entertaining a complaint under Section 18 of the said Act has no jurisdiction to pass an order providing for access to the information.

32. In the facts of the case, the Appellant after having applied for information under Section 6 and then not having received any reply thereto, it must be deemed that he has been refused the information. The said situation is covered by Section 7 of the Act. The remedy for such a person who has been refused the information is provided under Section 19 of the Act. A reading of Section 19(1) of the Act makes it clear. Section 19(1) of the Act is set out below:

19. Appeal. -(1) Any person who, does not receive a decision within the time specified in

Sub-section (1) or clause (a) of Sub-section (3) of section 7, or is aggrieved by a decision of the Central Public Information Officer or the State Public Information Officer, as the case may be, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or the State Public Information Officer as the case may be, in each public authority:

Provided that such officer may admit the appeal after the expiry of the period of thirty days if he or she is satisfied that the Appellant was prevented by sufficient cause from filing the appeal in time.

33. A second appeal is also provided under Sub-section (3) of Section 19. Section 19(3) is also set out below:

(3) A second appeal against the decision under Sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission:

Provided that the Central Information Commission or the State Information Commission, as the case may be, may admit the appeal after the expiry of the period of ninety days if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal in time.

34. Section 19(4) deals with procedure relating to information of a third party. Sections 19(5) and 19(6) are procedural in nature. Under Section 19(8) the power of the Information Commission has been specifically mentioned. Those powers are as follows:

19(8). In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to:

(a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including:

- (i) by providing access to information, if so requested, in a particular form;
- (ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;
- (iii) by publishing certain information or categories of information;
- (iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records;
- (v) by enhancing the provision of training on the right to information for its officials;
- (vi) by providing it with an annual report in compliance with clause (b) of Sub-section (1) of Section 4;

(b) require the public authority to compensate the complainant for any loss or other detriment suffered;

(c) impose any of the penalties provided under this Act;

(d) reject the application.

35. The procedure for hearing the appeals have been framed in exercise of power under clauses (e) and (f) of Sub-section (2) of Section 27 of the Act. They are called the Central Information Commission (Appeal Procedure) Rules, 2005. The procedure of deciding the appeals is laid down in Rule 5 of the said Rules. Therefore, the procedure contemplated under Section 18 and Section 19 of the said Act is substantially different. The nature of the power under Section 18 is supervisory in character whereas the procedure under Section 19 is an appellate procedure and a person who is aggrieved by refusal in receiving the information which he has sought for can only seek redress in the manner provided in the statute, namely, by following the procedure under Section 19. This Court is, therefore, of the opinion that Section 7 read with Section 19 provides a complete statutory mechanism to a person who is aggrieved by refusal to receive information. Such person has

to get the information by following the aforesaid statutory provisions. The contention of the Appellant that information can be accessed through Section 18 is contrary to the express provision of Section 19 of the Act. It is well known when a procedure is laid down statutorily and there is no challenge to the said statutory procedure the Court should not, in the name of interpretation, lay down a procedure which is contrary to the express statutory provision. It is a time honoured principle as early as from the decision in Taylor v. Taylor (1876) 1 Ch. D. 426 that where statute provides for something to be done in a particular manner it can be done in that manner alone and all other modes of performance are necessarily forbidden. This principle has been followed by the Judicial Committee of the Privy Council in Nazir Ahmad v. Emperor MANU/PR/0020/1936 : AIR 1936 PC 253(1) and also by this Court in Deep Chand v. State of Rajasthan MANU/SC/0118/1961 : AIR 1961 SC 1527, (para 9) and also in State of U.P. v. Singhara Singh reported in MANU/SC/0082/1963 : AIR 1964 SC 358 (para 8).

36. This Court accepts the argument of the Appellant that any other construction would render the provision of Section 19(8) of the Act totally redundant. It is one of the well known canons of interpretation that no statute should be interpreted in such a manner as to render a part of it redundant or surplusage.

37. We are of the view that Sections 18 and 19 of the Act serve two different purposes and lay down two different procedures and they provide two different remedies. One cannot be a substitute for the other.

38. It may be that sometime in statute words are used by way of abundant caution. The same is not the position here. Here a completely different procedure has been enacted under Section 19. If the interpretation advanced by the learned Counsel for the Respondent is accepted in that case Section 19 will become unworkable and especially Section 19(8) will be rendered a surplusage. Such an interpretation

is totally opposed to the fundamental canons of construction. Reference in this connection may be made to the decision of this Court in Aswini Kumar Ghose and Anr. v. Arabinda Bose and Anr. MANU/SC/0022/1952 : AIR 1952 SC 369. At page 377 of the report Chief Justice Patanjali Sastri had laid down:

It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute.

39. Same was the opinion of Justice Jagannadhas in Rao Shiv Bahadur Singh and Anr. v. State of U.P. MANU/SC/0081/1953 : AIR 1953 SC 394 at page 397:

It is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application.

40. Justice Das Gupta in J.K. Cotton Spinning and Weaving Mills Company Ltd. v. State of Uttar Pradesh and Ors. MANU/SC/0287/1960 : AIR 1961 SC 1170 at page 1174 virtually reiterated the same principles in the following words: the courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect.

41. It is well-known that the legislature does not waste words or say anything in vain or for no purpose. Thus a construction which leads to redundancy of a portion of the statute cannot be accepted in the absence of compelling reasons. In the instant case there is no compelling reason to accept the construction put forward by the Respondents.

42. Apart from that the procedure under Section 19 of the Act, when compared to Section 18, has several safeguards for protecting the interest of the person who has been refused the information he has sought.

Section 19(5), in this connection, may be referred to. Section 19(5) puts the onus to justify the denial of request on the information officer. Therefore, it is for the officer to justify the denial. There is no such safeguard in Section 18. Apart from that the procedure under Section 19 is a time bound one but no limit is prescribed under Section 18. So out of the two procedures, between Section 18 and Section 19, the one under Section 19 is more beneficial to a person who has been denied access to information.

43. There is Anr. aspect also. The procedure under Section 19 is an appellate procedure. A right of appeal is always a creature of statute. A right of appeal is a right of entering a superior forum for invoking its aid and interposition to correct errors of the inferior forum. It is a very valuable right. Therefore, when the statute confers such a right of appeal that must be exercised by a person who is aggrieved by reason of refusal to be furnished with the information. In that view of the matter this Court does not find any error in the impugned judgment of the Division Bench. In the penultimate paragraph the Division Bench has directed the Information Commissioner, Manipur to dispose of the complaints of the Respondent No. 2 in accordance with law as expeditiously as possible.

44. This Court, therefore, directs the Appellants to file appeals under Section 19 of the Act in respect of two requests by them for obtaining information vide applications dated 9.2.2007 and 19.5.2007 within a period of four weeks from today. If such an appeal is filed following the statutory procedure by the Appellants, the same should be considered on merits by the

appellate authority without insisting on the period of limitation.

45. However, one aspect is still required to be clarified. This Court makes it clear that the notification dated 15.10.2005 which has been brought on record by the learned Counsel for the Respondent vide I.A. No. 1 of 2011 has been perused by the Court. By virtue of the said notification issued under Section 24 of the Act, the Government of Manipur has notified the exemption of certain organizations of the State Government from the purview of the said Act. This Court makes it clear that those notifications cannot apply retrospectively. Apart from that the same exemption does not cover allegations of corruption and human right violations. The right of the Respondents to get the information in question must be decided on the basis of the law as it stood on the date when the request was made. Such right cannot be defeated on the basis of a notification if issued subsequently to time when the controversy about the right to get information is pending before the Court. Section 24 of the Act does not have any retrospective operation. Therefore, no notification issued in exercise of the power under Section 24 can be given retrospective effect and especially so in view of the object and purpose of the Act which has an inherent human right content.

46. The appeals which the Respondents have been given liberty to file, if filed within the time specified, will be decided in accordance with Section 19 of the Act and as early as possible, preferably within three months of their filing. With these directions both the appeals are disposed of.

47. There will be no order as to costs.

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 10044 of 2010 (Arising out of Special Leave Petition (C) No. 32855 of 2009)

Decided On: 26.11.2010

Appellants: **Central Public Information Officer, Supreme Court of India**

Vs.

Respondent: **Subhash Chandra Agrawal**

[Alongwith Civil Appeal No. 10045 of 2010 (Arising out of Special Leave Petition (C) No. 32856 of 2009) and Civil Appeal No. 2683 of 2010)]

Hon'ble Judges:

B. Sudershan Reddy and S. S. Nijjar, JJ.

Subject: Right to Information

JUDGMENT

B. Sudershan Reddy, J.

Special Leave Petition (c) Nos. 32855 of 2009

1. Leave granted.

2. This appeal is directed against the impugned order dated 24th November, 2009 passed by the Central Information Commission (CIC) whereby and whereunder the CIC having allowed the appeal preferred by Subhash Chandra Agrawal, respondent herein, directed the Central Public Information Officer (CPIO), Supreme Court of India to furnish information as sought by him.

3. The respondent Subhash Chandra Agarwal requested the CPIO, Supreme Court of India to arrange to send him a copy of "complete file/s (only as available in Supreme Court) inclusive of copies of complete correspondence exchanged between concerned constitutional authorities with file notings relating to said appointment of Mr. Justice HL Dattu, Mr. Justice AK Ganguly and Mr. Justice RM Lodha superseding seniority of Mr. Justice P Shah, Mr. Justice AK Patnaik and Mr. Justice VK Gupta as allegedly objected to Prime Minister's Office (PMO) also". He further requested the CPIO not to invoke Section 6(3) of the Right to Information Act (for short 'the Act').

4. The CPIO, Supreme Court of India promptly replied to the application so filed under the said Act duly informing the respondent that the Registry does not deal with the matters pertaining to the appointment of Hon'ble Judges of the Supreme Court of India. Appointments of Hon'ble Judges of the Supreme Court and High Courts are made by the President of India as per the procedure prescribed by law and the matters relating thereto are not dealt with and handled by the Registry of the Supreme Court of India. The CPIO accordingly informed the respondent that the information sought by him is "neither maintained nor available in the Registry".

5. The respondent Subhash Chandra Agrawal preferred appeal before the appellate authority of the Supreme Court of India challenging the said order. The appellate authority dismissed the appeal and confirmed the order of the CPIO. Thereafter, the respondent preferred a further appeal before the CIC purported it to be under Section 19 of the Act. The CIC having set aside the orders passed by the authorities, directed the CPIO, Supreme Court to furnish the information sought by the respondent. It is that order which is under challenge before us.

6. The CIC mainly relied upon the order passed by the learned Single Judge of the Delhi High Court in Writ Petition No. 288 of 2009 titled Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal. of course, the CIC also relied on the decision

of this Court in **S.P. Gupta v. Union of India** MANU/SC/0080/1981 : (1981) Supp SCC 87.

7. The learned Attorney General appearing on behalf of the appellants while placing strong reliance upon the decision of this Court in **Supreme Court Advocates-on-Record Association v. Union of India** MANU/SC/0073/1994 : (1993) 4 SCC 441 inter alia submitted that the ratio of the decision in S.P. Gupta (supra) is required to be understood and appreciated in the light of the observations made by this Court in Supreme Court Advocates-on-Record Association inasmuch as S.P. Gupta's case has been explained by the larger Bench. The submission was that disclosure of the information sought for by the respondent cannot be furnished in public interest. It is in the public interest to keep the appointment and transfer from "needless intrusions by strangers and busybodies in the functioning of the judiciary". Learned Attorney General placed particular reliance on the following paragraph of the said decision.

This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busybodies in the functioning of the judiciary under the garb of public interest litigation....

8. It was further submitted that the appointment of Judges is essentially a discharge of constitutional trust as laid down by this Court in **Subhash Sharms v. Union of India** MANU/SC/0643/1990 : (1991) Supp. 1 SCC 574. The submission was that the information made available to the Chief Justice of India in respect of appointment of Judges of the High Court and as well as the Supreme Court is held by him in trust and in fiduciary capacity. This

submission of the learned Attorney General received considerable support from the various High Courts of the country except the High Court of Guwahati as is evident from their response filed pursuant to the notices issued by this Court.

9. The learned Counsel for the respondent Mr. Prashant Bhushan placed heavy reliance on paragraphs 83, 84 and 85 of the decision of this Court in S.P. Gupta.

10. That on a holistic reading of the said judgment, it appears to us that the Court was mainly dealing with the question as to whether any immunity could be claimed from production of the records in respect of the correspondence between the Law Minister and the Chief Justice of India and the relevant notings made by them in regard to the transfer of a High Court Judge including the Chief Justices of the High Court which were extremely material for deciding whether there was full and effective consultation? It is observed at more than one place that the non-disclosure of the said documents would seriously handicap the petitioner therein in showing that there was no full and effective consultation with the Chief Justice of India or that the transfer was by way of punishment and not in public interest. It is observed:

It would become almost impossible for the petitioner, without the aid of these documents, to establish his case, even if it be true.

The Court felt that "all relevant documents should be produced before the court so that the full facts may come before the people, who in a democracy are the ultimate arbiters". The Court further observed: "We do not see any reason why, if the correspondence between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India and the relevant notes made by them, in regard to discontinuance of an Additional Judge are relevant to the issues arising in a judicial proceeding, they should not

be disclosed.Where it becomes relevant in a judicial proceeding, why should the Court and the opposite party and through them, the people not know what are the reasons for which a particular appointment is made or a particular Additional Judge is discontinued or a particular transfer is effected. We fail to see what harm can be caused by the disclosure of true facts when they become relevant in a judicial proceeding.

11. Whether the said decision would be applicable when such information is sought under the provisions of the Right to Information Act is an important question that is required to be gone into.

12. Having heard the learned Attorney General and the learned Counsel for the respondent, we are of the considered opinion that a substantial question of law as to the interpretation of the Constitution is involved in the present case which is required to be heard by a Constitution Bench. The case on hand raises important questions of constitutional importance relating to the position of Hon'ble the Chief Justice of India under the Constitution and the independence of the Judiciary in the scheme of the Constitution on the one hand and on the other, fundamental right to freedom of speech and expression. Right to information is an integral part of the fundamental right to freedom of speech and expression guaranteed by the Constitution. Right to Information Act merely recognizes the constitutional right of citizens to freedom of speech and expression. Independence of Judiciary forms part of basic structure of the Constitution of India. The independence of Judiciary and the fundamental right to free speech and expression are of a great value and both of them are required to be balanced.

13. The Constitution is fundamentally a public text--the monumental character of a Government and the people-- and Supreme Court is required to apply it to resolve public

controversies. For, from our beginnings, a most important consequence of the constitutionally created separation of powers has been the Indian habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions in the form of public law remedies, in an attempt to secure ultimate resolution by the Supreme Court. In this way, important aspects of the most fundamental issues confronting our democracy finally arrive in the Supreme Court for judicial determination. Not infrequently, these are the issues upon which contemporary society is most deeply divided. They arouse our deepest emotions. This is one such controversy. William J. Brennan, Jr. in one of his public discourse observed:

We current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. This realization is not, I assure you, a novel one of my own creation. Permit me to quote from one of the opinions of our Court, **Weems v. United States** 217 U.S. 349, written nearly a century ago:

Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the

words of Chief Justice John Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

14. The current debate is a sign of a healthy nation. This debate on the Constitution involves great and fundamental issues. Most of the times we reel under the pressure of precedents. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time?

15. Following substantial questions of law as to the interpretation of the Constitution arise for consideration:

1. Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?
2. Whether the information sought for cannot

be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?

3. Whether the information sought for is exempt under Section 8(i)(j) of the Right to Information Act?

16. The above questions involve the interpretation of the Constitution raise great and fundamental issues.

17. For the aforesaid reasons, we direct the Registry to place this matter before Hon’ble the Chief Justice of India for constitution of a Bench of appropriate strength. Let the papers be accordingly placed before Hon’ble the Chief Justice of India.

18. Special Leave Petition (Civil) No. 32856 of 2009

Leave granted. Tag with Civil Appeal arising out of S.L.P.(c) No. 32855 of 2009.

19. Civil Appeal No. 2683 of 2010

Tag with Civil Appeal arising out of S.L.P.(c) No. 32855 of 2009.

IN THE HIGH COURT OF ANDHRA PRADESH

Writ Petition No. 28785 of 2011

Decided On: 02.11.2011

Appellants: **Public Information Officer, Under RTI Act, Syndicate Bank, Regional Office, Mugulrajapuram, Vijayawada**

Vs.

Respondent: **Central Information Commission under Right to information Act, New Delhi, rep. by its Registrar and another**

Hon'ble Judges:

Hon'ble Sri Justice C.V. Nagarjuna Reddy

Subject: Right to Information

ORDER

Hon'ble Sri Justice C.V. Nagarjuna Reddy

1. This Writ Petition is filed for a certiorari to quash decision No. CIC/SM/A/2010/001566/SG/14914, dated 28-09-2011, of respondent No. 1, in Appeal No. CIC/SM/A/2010/001566/SG.

2. The petitioner is the Public Information Officer, Syndicate Bank Regional Office at Mugulrajapuram, Vijayawada, under the Right to Information Act, 2005 (for short 'the Act').

3. Respondent No. 2 made application, dated 24-07-2010, before the petitioner, under the Act, seeking the following information:

1. When were the accounts of the unit M/s. Coastal Andhra Agri Feed Technologies declared NPA and the exact amount of book debts as on the date of NPA of all its accounts.
2. What is the status of the account as on 1st October, 2009, whether it is classified substandard, doubtful or loss asset.
3. Whether the Vakalpudi Branch submitted Annexure-I, for ONE TIME SETTLEMENT SCHEME FOR MSE ACCOUNTS to the Competent Authority in compliance of

Circular No. 213-2009-BC-REC-09/24-09-2009 issued by General Manager, Syndicate Bank, Head Office, Manipal.

4. If not covered as to the reason why the bank OTS was not offered to the said unit and the particulars and details as to why the OTS was declined and the details of orders passed in this regard, may be informed.

5. How many notices were issued under Section 13(2) of SARFAESI Act to the borrower and on what dates and the exact amounts demanded to be repaid by the borrowers.

4. The said application was rejected by the petitioner vide Order, dated 04-08-2010, on the ground that the Bank has initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') for recovery of dues from respondent No. 2 and that therefore, the information sought for by him falls within the exempted category under Section 8(1)(h) of the Act. Against the said order of the petitioner, respondent No. 2 filed a first appeal before the General Manager of the Bank, who is senior in rank to the petitioner. While substantially confirming the order of the petitioner, the General Manager, however, directed the petitioner to furnish more information regarding the OTS proposal. Accordingly, he has partly allowed the appeal. Feeling aggrieved

by the said order, respondent No. 2 has filed a Second Appeal before respondent No. 1, who, by the impugned order, allowed the same by holding that the onus, to prove that denial of information is justified, is on the Public Information Officer under Section 19(5) of the Act and that since he failed to offer any such justification, the appeal deserves to be allowed. Feeling aggrieved by the said order, the Public Information Officer has filed the present Writ Petition.

5. Heard Sri A.Krishnam Raju, learned Counsel for the petitioner, and perused the record.

6. In the first place, this Court is of the opinion that the Writ Petition, filed by the Public Information Officer, is not maintainable because even though he is an employee, he is designated as Public Information Officer, who is charged with the duty of dealing with the requests of persons seeking information and render reasonable assistance to such persons. Under Section 7 of the Act, the Public Information Officer shall dispose of the requests received by him either by providing information on payment of the prescribed fee or by rejecting the request for any of the reasons specified in Sections 8 and 9 of the Act. A person, who does not receive a decision within the time specified under sub-section 1 of Section 7 of the Act or is aggrieved by the decision of the Central Public Information Officer or the State Public Information Officer, is entitled to file an appeal to such Officer, who is senior in rank to the Central Public Information Officer or the State Public Information Officer. A second appeal against such decision shall lie to the Central Information Commission or the State Information Commission as the case may be.

7. The scheme of the Act, discussed above would reveal that every Public Information Officer nominated as such under the Act has a dual role to play viz., as an officer of the Public Authority and also the Public Information Officer. While such Officer is loyal to his

employer while acting in his role as the Officer, he acts as a quasi-judicial authority while disposing of the request made for furnishing information. His orders are subject to further appeals. Therefore, in the opinion of this Court, the Public Information Officer cannot dawn the role of the Officer of the Public Authority in relation to the orders passed by the appellate authorities against the orders passed by him. If his order is reversed by the appellate authority, he cannot be treated as aggrieved party giving rise to a cause of action for him to question such Orders. It is only either the public authority, against whom the directions are given, or any other party, who feels aggrieved by such directions, that can question the orders passed by the appellate authorities. As such, the Public Information Officer, who filed this Writ Petition, is wholly incompetent to question the order of the appellate authority and the Writ Petition filed by him is not maintainable.

8. Even on merits, this Court has no hesitation to hold that the information sought for by respondent No. 2 does not fall within the exempted category under Section 8(1)(h) of the Act because the information, which respondent No. 2 has sought, relates to pending proceedings before the Debt Recovery Tribunal. However, what is exempted under section 8(1)(h) is information, which would impede the process of investigation or apprehension or prosecution of offenders. It is not the pleaded case of the Bank that any investigation or apprehension or prosecution of respondent No. 2 will be impeded by furnishing information sought for by him. Even if the information relates to a pending dispute before a Court or Tribunal, that would not fall under Section 8(1)(h) of the Act.

9. For the above-mentioned reasons, the Writ Petition is dismissed.

10. As a sequel, WPMP. No. 35591 of 2011, filed by the petitioner for interim relief, is disposed of as infructuous.

IN THE HIGH COURT OF BOMBAY AT GOA

Writ Petition No. 478 of 2008 and Writ Petition No. 237 of 2011

Decided On: 14.11.2011

Appellants: **Public Information Officer Joint Secretary to the Governor Raj Bhavan, Donapaula, Goa and Secretary to Governor First Appellate Authority, Raj Bhavan, Donapaula, Goa**

Vs.

Respondent: **Shri. Manohar Parrikar Leader of Opposition, Goa State Assembly Complex, Porvorim, Bardez, Goa and Goa State Information Commissioner, Ground Floor, Shram Shakti Bhavan, Patto Plaza, Panaji, Goa**

AND

Appellants: **Special Secretary to the Government of Goa**

Vs.

Respondent: **State Chief Information Commissioner, State of Goa and Advocate A. Rodrigues**

Hon'ble Judges:

D.G. Karnik, & F.M. Reis, JJ.

Subject: Right to Information

JUDGMENT

D.G. Karnik, J.

1. By an order dated 22nd October 2008, the Court directed that Writ Petition No. 478 of 2008 be fixed for final disposal at an early date. The petition was accordingly placed on board before us for final hearing. By an order dated 6th June 2011, the Court directed that Writ Petition No. 237 of 2011 be put up along with Writ Petition No. 478 of 2008. Accordingly these petitions are heard and disposed of by this common judgment as they involve common questions of law.

Facts in Writ Petition No. 478 of 2008

2. In July/August 2007, some changes occurred in the political equations and political situation in the State of Goa resulting in the Governor of Goa directing the Chief Minister to prove

his majority in the Legislative Assembly. A resolution of the Vote of Confidence was passed in the Legislative Assembly, and the Speaker of the Legislative Assembly made a report to the Governor. In turn, the Governor of Goa sent his report to the Union Home Minister. On September 21, 2007, Mr. Manohar Parrikar, the Leader of Opposition (respondent no.1), made an application to the Public Information Officer (for short "the PIO") in the Secretariat of the Governor of Goa, asking for a copy of the report sent by the Governor of Goa to the Union Home Minister regarding the political situation in Goa during the period from 24th July 2007 to 14th August 2007. By a letter dated 22nd December 2007, the PIO in the Secretariat of the Governor of Goa declined to furnish the copy and wrote: "I am to inform that these communications are highly sensitive, and secret in nature. It is regretted that the same cannot be supplied in accordance with the exemption allowed under the Right to Information Act, 2005". Aggrieved by the refusal, the 1st respondent filed an appeal before the Secretary to the Governor

being the Appellate Authority. By its order dated 4th April 2008, the Appellate Authority dismissed the appeal. In second appeal, the Goa State Information Commission (for short "the GSIC") set aside the order of the first appellate authority by partly allowing the appeal. It held that the report made by the Speaker of the Legislative Assembly of Goa to the Governor of Goa cannot be disclosed. It, however, directed the PIO to furnish to the respondent no.1 the other information i.e. a copy of the report sent by the Governor of Goa to the Union Home Minister on the political situation during the period from 24th July 2007 to 14th August 2007, after severing the report of the Speaker of the Legislative Assembly. Aggrieved by the decision, the petitioners are before us.

Facts in Writ Petition No. 237 of 2011

3. The respondent no.3 is a practising advocate. He appears to have a grievance against the conduct of the Advocate General of the State of Goa and the fee charged by him to the Government. He made several complaints/representations to the Governor of Goa against the Advocate General of Goa and was not satisfied with the action taken (rather the inaction) on his complaints/representations. Therefore, by a letter dated 29th November 2010, he applied to the PIO in the secretariat of the Governor of Goa requesting him to furnish him the details of the action taken on his complaints/representations and also asked for the copies of all notings and correspondence on the complaints/representations made by him. By his reply dated 29th November 2010 the PIO informed the petitioner that an affidavit had been filed by his office in another matter in the Hon'ble High Court, Bombay at its bench at Panaji that H.E. Governor is not a public authority under the Right to Information Act 2005, and that pending the decision of the High Court in that matter, it was not possible for him to respond to his request. Though the number of the other matter in which the affidavit had

been filed was not mentioned in the reply, it appears that the PIO was referring to the affidavit filed in the connected Writ Petition No.278 of 2008. Not satisfied with the reply of the PIO, respondent no.3 filed a complaint under Section 18 of the Right to Information Act, 2005 (for short "the RTI Act") to the GSIC. Upon receipt of the complaint, the GSIC issued a notice to the PIO as also to the Governor of Goa requiring them to appear before the Commission in person on 4 January 2011. Secretary to the Governor of Goa, on behalf of the Governor of Goa, filed a reply claiming immunity under Article 361 of the Constitution of India and contending that the Governor cannot be arrayed as a party respondent in any proceedings. The PIO submitted a separate reply contending that the Governor was not a public authority under the RTI Act. He also contended that if the respondent no.3 was aggrieved by the communication of the PIO dated 30th November 2010, he ought to have filed an appeal and the complaint under Section 18 of the RTI Act was not maintainable. By an order dated 31st March 2011, the GSIC accepted the contention that the immunity granted to the Governor under Article 361(1) of the Constitution of India was complete and the Governor was not answerable to any court and the complaint made against him was not maintainable. The GSIC however rejected the contention that Governor was not a public authority under the RTI Act. The GSIC accordingly remanded the matter back to the PIO to deal with the application of the respondent no.3 dated 29 November 2010 in accordance with law. Being aggrieved by this direction, the Special Secretary to the Governor has filed the Writ Petition No.237 of 2011.

Concessions of the respondent no.1 in
W.P. NO. 478 of 2008

4. At the outset, it may be noted that the decision of the GSIC of severing of the report of Speaker of the Legislative Assembly and

not furnishing its copy to respondent no.1, while directing the PIO to furnish a copy of the report of the Governor, is not challenged by the respondent no.1. Mr. Nadkarni, learned Senior Advocate appearing for respondent no.1 also submitted before us that respondent no.1 does not want to challenge the direction of the GSIC of severance of the report of the Speaker of the Legislative Assembly. We are, therefore, not required to consider the legality and validity of the direction as the same has been accepted by the respondent no.1.

Preliminary objections
(in W.P. No. 478 of 2008)

5. Mr. Nadkarni appearing for the respondent no.1 raised a preliminary objection to the maintainability of the writ petition. He submitted that petitioner no.1 is the PIO whose decision was affirmed by petitioner no.2, as the first appellate authority. The petitioner no.2 is the first appellate authority whose decision has been reversed by the GSIC. Both the petitioners are subordinate to the GSIC which is the final appellate authority. The decisions rendered by the petitioner nos.1 and 2 have a colour of judicial decision and, in any event, they are quasi-judicial inasmuch as they decide upon the existence and extent of the right of a citizen to have access to the information under the RTI Act. Their decisions are subject to an appeal. They being judicial authorities subordinate to the GSIC, have no right and authority to challenge the decision of the GSIC. As a matter of judicial discipline, a Court or a Tribunal cannot file an appeal or writ petition against the decision of an appellate authority reversing its decision, except perhaps for expunging of any adverse remarks made against the lower Court or the Tribunal. Permitting a Court or a Tribunal to challenge the decision rendered in an appeal or revision by appellate or revisional authority would amount to judicial indiscipline and, therefore, the writ petition should not be entertained. In support, he relied upon a

decision of a Division Bench of this Court in Village Panchayat of Velim vs. Shri Valentine S.K.F. Rebello and Another, 1990 (1) GLT 70.

6. In Village Panchayat of Velim (supra), the facts were that the respondent, who claimed to be the owner of a plot, submitted an application for permission for erection of a building to the Village Panchayat, which was rejected by it vide letter dated 6th June 1987. The Deputy Collector allowed the appeal of the respondent and granted the permission. The Village Panchayat challenged the order of the Deputy Collector in the High Court by a writ petition. The High Court held that under the scheme of Village Panchayat Regulations, the Panchayat cannot at all be held to be "a person aggrieved" and consequently, it had no right to challenge the decision made by the Deputy Collector. The Court further accepted the argument of respondent that the Village Panchayat ought not to be permitted to maintain the petition merely because it believed that the appellate decision was not palatable and allowing it to challenge the decision would amount to subversion of judicial discipline. The Court observed: "If the Panchayat is allowed to challenge the appellate order, as rightly pointed out by Shri Kakodkar, it may lead to chaos which the judicial discipline must decry". We respectfully agree with the view taken by the Division Bench. We also are of the view that ordinarily a Court, a Tribunal or any other body having a power to decide, shall not be entitled to challenge by way of an appeal, revision or otherwise a decision rendered by the appellate or revisional authority, modifying or reversing its decision. That would amount to subversion of the judicial discipline. It is inconceivable that on his decision being reversed by the District Judge, a Civil Judge filing an appeal in the High Court challenging the decision of the District Judge. The same principle would apply with equal force for the decisions rendered by any judicial or quasi-judicial bodies or authorities. However, the principle laid down above would

not apply to the facts of the present case for the reasons indicated below.

Section 19 of the RTI Act provides that any person who does not receive a decision within the specified time or is aggrieved by the decision of a Central Public Information Officer or the State Public Information Officer, may within 30 days file an appeal to the specified appellate authority. The first appeal under Section 19 of the RTI Act is contemplated only by or at the instance of the person whose application for an information has not been decided or rejected by the PIO. Sub-section (5) of Section 19 provides that in any appeal proceedings, the onus to prove that the denial of the request was justified shall be on the PIO who has denied the request. The PIO who passes the initial order refusing the request for an information is required to defend his action before the appellate authority and the burden of proving that the denial was justified is on him. Thus, the PIO is not merely an authority which initially decides upon the request of an applicant, but in effect is a party to the appeal filed before the appellate authority. The PIO acts as a medium for dissemination of an information by the "public authority" under the RTI Act. If he holds that the public authority is not required to disclose the information, he is required to defend his decision. The PIO can be subjected to a penalty under Section 20 of the RTI Act for non-disclosure of the information. The proviso to Section 20 provides that the PIO shall be given a reasonable opportunity of being heard before any penalty is imposed on him. Thus, the PIO is, in effect, a party litigant in an appeal or a second appeal which is filed before the first appellate authority or the Information Commission and in certain circumstances is also personally liable to a penalty. Being so, we are not inclined to accept the submission of Mr. Nadkarni that the writ petition at the instance of the PIO against the decision of the State Information

Commission is not maintainable and/or should not be entertained.

Contentions of the parties

7. Mr. Vivek Tankha, learned Additional Solicitor General appearing for the petitioner in Writ Petition No. 237 of 2011 and Mr. Kantak, learned Advocate General appearing for the petitioner in Writ Petition No. 478 of 2008, submitted that the Governor was not a Public Authority under the RTI Act and as such was not required to disclose any information. Learned A.S.G. and the A.G. invited our attention to the definitions of "competent authority" in Section 2(e) and "public authority" in Section 2(h) of the RTI Act, and submitted that the "competent authority" and the "public authority" were two different authorities or bodies contemplated by the RTI Act. The expressions "competent authority" and "public authority" were mutually exclusive, and the "competent authority" cannot be regarded as the "public authority" within the meaning of Section 2(h) of the RTI Act. The President and the Governor, who are included in the definition of "competent authority" are, therefore, not the "public authority" within the meaning of Section 2(h). The Governor is the appointing authority for the Chief State Information Commissioner as well as the State Information Commissioners and has an authority to remove any of the members of the State Information Commission. The Governor being the appointing, disciplinary and removing authority for the members of the State Information Commission, the State Information Commission (GSIC) has no authority to issue any order or direction to the Governor to disclose any information. Mr. Tankha further submitted that the President and the Governor were sovereign. The sovereignty vests in the President and the Governor, they being the heads of the Union and the State respectively. No authority, not even the Information Commission, has any jurisdiction or power to issue any direction to the sovereign, i.e. the

President or the Governor, to disclose any information. Lastly, he submitted that the Governor enjoys an absolute immunity under Article 361 of the Constitution of India. The immunity enjoyed under Article 361 is not only personal but relates to his office and all his actions. The immunity granted under Article 361 is absolute and, therefore, no notice can be issued to the Governor, and no direction can be issued to the Governor to disclose any information under the RTI Act. Mr. Tankha further submitted that the RTI Act contemplates the Information Commission to be a multi-member body. The GSIC at the time it passed the impugned order consisted of only the State Chief Information Commissioner, the only other State Information Commissioner having retired. As such, the State Chief Information Commissioner could not have passed the impugned order by acting singly. Mr. Kantak, learned A.G. supplemented the arguments of Mr. Tankha and further submitted that the Governor's report made to the President (through the Union Home Minister) was made in a fiduciary capacity and was exempt from disclosure under Section 8(1)(e) of the RTI Act.

8. Per contra, Mr. Nadkarni, appearing for respondent no.1 submitted that the President and the Governor are appointed by or under the Constitution of India (for short "the Constitution"). They are, therefore, the public authorities under Section 2(h) of the RTI Act. The President and the Governor being the public authorities, are amenable to the provisions of the RTI Act and are required to disclose any information when ordered by the PIO or in an appeal by the appellate authority or the Information Commission. The actions of the Governor have to be in consonance with the Constitution and the law. Under Article 159 of the Constitution, the Governor takes an oath of office to preserve, protect and defend the Constitution and the law. The Governor is, therefore, bound by the law including the RTI Act. The fact that the Governor is an

appointing as well as disciplinary authority of the PIO, the appellate authority as well as the State Information Commissioners, does not make him immune from disclosing information ordered by any of them in accordance with the RTI Act. He is bound to comply with the orders passed under the RTI Act and give access to the citizen of the information, if so ordered. So far as the President is concerned he may represent to the external powers India as a sovereign country. He represents the external sovereignty. However, there is nothing like internal sovereignty and the President and the Governor are bound by the Constitution and the law. India being a democracy, the real sovereignty vests in the people of India and not in the President or the Governor, as the case may be. The concept of "King" being sovereign and the sovereignty being vested in the King is not applicable in case of a democracy where the people are sovereign and the President or the Governor are only titular heads. As regards the immunity conferred under Article 361 of the Constitution is concerned, it is only a personal immunity given to the Governor. The personal immunity conferred by Article 361 of the Constitution extends to an immunity from being prosecuted and immunity from civil liability in person. The immunity does not relate to a State action or an action taken by the President or the Governor in their respective official capacities as the President or the Governor, in exercising functions of the State. The official actions of the President and the Governor are justiciable and have been held to be so by the Supreme Court. Mr. Nadkarni countered the argument of exemption under Section 8(1)(e) of the RTI Act by submitting that the relationship between the President and the Governor was not fiduciary. The report of the Governor to the President (through the Home Minister) under Article 356 of the Constitution was made in performance of a constitutional duty and not in a fiduciary capacity.

9. In the light of the submissions of the parties, the following points arise for our determination:

- (1). Whether the Governor is a “public authority” within the meaning of Section 2(h) of the RTI Act? and whether by reason of being included in the definition of “competent authority” he stands excluded from the definition of “public authority” under the RTI Act?
- (2). Whether the Governor is a sovereign and being sovereign, no direction can be issued to the Governor for disclosure of any information under the RTI Act?
- (3). What is the extent of immunity enjoyed by the Governor under Article 361 of the Constitution of India? Whether in view of such immunity, no direction can be issued and no order can be passed under the RTI Act, which has an effect of requiring the Governor to disclose any information under the RTI Act?
- (4). Whether the information sought for is exempt from disclosure under Section 8(1) (e) of the RTI Act?
- (5). Whether the GSIC, which had become a single member body on account of retirement of one of the two members constituting it when it passed the order dated 18th March 2011 (impugned in W.P. No. 237 of 2011), could not have passed it in the absence of a second member?

Point No.1

Whether the Governor is a “public authority” within the meaning of section 2(h) of the RTI Act? and, whether by reason of being included in the definition of “competent authority” the Governor stands excluded from the definition of “public authority” under the RTI Act?

10. In order to decide the question, it is necessary to refer to the definitions of the “competent authority” and the “public

authority” as given in the RTI Act, which read as under:

2(e) competent authority” means-

- (i) the Speaker in the case of the House of the People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States or Legislative Council of a State;
- (ii) the Chief Justice of India in the case of the Supreme Court;
- (iii) the Chief Justice of the High Court in the case of a High Court;
- (iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution;
- (v) the administrator appointed under article 239 of the Constitution;

2(h) “public authority” means any authority or body or institution of self-government established or constituted-

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or order made by the appropriate Government, and includes any-
 - (i) body owned, controlled or substantially financed;
 - (ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government;

11. Mr. Tankha, learned ASG and Mr. Kantak, learned A.G. submitted that the expressions “competent authority” and “public authority” were separately defined under the Act. There can be no overlapping between the two authorities. Whoever is the “competent

authority” under section 2(e) of the RTI Act cannot be the “public authority” and whoever is the “public authority” under section 2(h) of the RTI Act cannot be the “competent authority”. Since the two expressions are different, if there were to be any overlapping between the two, the Legislature would have specifically said so in the definition itself. If the competent authority was to be included in the definition of “public authority”, nothing prevented the Legislature from saying so by adding one more clause to sub-clauses (a) and (d) and to include the competent authority within the definition of “public authority”. Mr. Kantak also drew our attention to section 8 and in particular clauses (d) and (e) thereof. Section 8(1) of the RTI Act, insofar as it is relevant for our consideration, is quoted below:

8. Exemption from disclosure of information -

Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,

(a)...

(b)...

(c)...

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f)...

(g)...

(h)...

(i)...

(j)...

Mr. Kantak submitted that clause (d) of section 8 grants exemption from disclosure and the PIO is not required to disclose any information of commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party. Under clause (e) of section 8, the PIO is not required to disclose an information which is available to a person (public authority) in his fiduciary relationship. The decision of a PIO not to disclose the information covered by clause (d) and clause (e) of sub-section (1) is, however, subject to an exception which is provided in clauses (d) and (e) itself by qualifying the exemption by the words: “unless the competent authority is satisfied that larger public interest warrants the disclosure of such information”. The competent authority is, thus, given a power to override a decision of the public authority acting through the PIO of not disclosing an information contained in clauses (d) and (e), if the competent authority is satisfied that larger public interest warrants the disclosure of such information. If the competent authority has a power to override the decision of public authority not to disclose any information, then the competent authority must be regarded as a different than the public authority. The competent authority is superior to the public authority, as it is given a power to override a decision of the public authority, at least in certain cases like those mentioned in clauses (d) and (e) of section 8(1) of the RTI Act and that being so, the Court must hold that the competent authority is not the public authority within the meaning of section 2(h). The argument, attractive as it looks at the first blush, cannot be accepted for the reasons indicated below.

12. Section 3 of the RTI Act confers upon a citizen right to have an information. Indeed, it only recognizes the right which already exists in a citizen to have an information which is regarded as a fundamental right to freedom of speech and expression under Article 19(1)(a) of

the Constitution [see: Central Public Information Officer vs. Subhash Chandra Agarwal, (2011) 1 SCC 496 and the Hindu Urban Cooperative Bank Ltd. vs. The State Information Commission -Civil Writ Petition No. 19224 of 2006 decided on 9th May 2010 by the High Court of Punjab and Haryana, Coram: Mohinder Singh Sullar, J.]

Section 4 of the RTI Act confers a corresponding obligation on the public authority to give information. Section 5 of the RTI Act requires the public authority to designate as many PIOs as may be necessary to provide the informations to the persons requesting for an information. Section 6 prescribes the manner in which a citizen is required to make a request for an information to the PIO. Section 7 casts an obligation on the PIO to give the information. Section 8, as noticed earlier, grants exemption from disclosure of certain information. Section 9 also empowers the PIO to refuse an information where the request for providing access would involve an infringement of a copyright subsisting in any person other than the State. Section 11 provides for a procedure to be followed where the disclosure of the information relates to a third party. Sections 12 to 17 contained in Chapter III make a provision for constitution of Central and State Information Commission, their members, terms and conditions of their service, their appointment and removal. Section 18 defines the power and functions of the Central and State Information Commission. Section 19 provides for an appeal against a decision of the PIO to the first appellate authority and a further appeal against a decision of the first appellate authority to the Information Commission. Section 20 provides for a penalty which can be imposed by the Information Commission on the PIO at the time of deciding any complaint or appeal under section 19 of the RTI Act.

13. From the provisions of the RTI Act, it is clear that the decision whether the

information asked for by the applicant can be disclosed or exempt from disclosure under sections 8 or 9 of the RTI Act is to be taken by the PIO and not by the “public authority”. Section 9 specifically provides that the Central PIO or the State PIO, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State. The competent authority has been given a power to direct disclosure of an information notwithstanding anything contained in clauses (d) and (e) of section 8(1), where the competent authority is satisfied that the larger public interest warrants the disclosure of such information. Thus, the competent authority overrides the PIO and not the “public authority” on the issue of exemption under section 8(1) (d) and (e) of the RTI Act. The contention that the competent authority is superior to public authority inasmuch as it has a power to override the public authority in the matter of exemption under clauses (d) and (e) of section 8 and consequently there can be no overlapping between the two, therefore, cannot be accepted.

14. Under section 2(h) of the RTI Act, “public authority” includes any authority or body or institution of self-government established or constituted by or under the Constitution [see clause (a) of section 8(1)]. Undoubtedly, the post of President and that of the Governor is created by the Constitution. Article 52 of the Constitution says that there shall be a President of India. Article 153 of the Constitution says that there shall be a Governor for each State. When India was governed by the British, there was no post of the President. The Governor General and the Governors contemplated under the British Rule were different than the Governor of a State appointed under Article 153 of the Constitution. Posts of the President and the Governor are created by the Constitution.

15. In *Executive Committee of Vaish Degree College, Shamli and Others vs. Lakshmi Narain and Others*, MANU/SC/0052/1979 : (1976) 2 SCC 58, the majority speaking through Fazal Ali, J. observed: "It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words, the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers." The President and the Governor owe their existence to the Constitution. It, therefore, cannot be doubted that the posts of the President and the Governor are created by or under the Constitution. Being so, the President and the Governor are clearly covered by clause (h) of the definition of the "public authority".

16. It is true that the President and the Governor have been specifically included in the definition of "competent authority". But the mere fact that the President and the Governor are authorities mentioned in sub-clauses (iv) of section 2(e) of the RTI Act, would not exclude them from the definition of "public authority". If any of the authorities mentioned in clauses (i) to (v) of section 2(e) which defines "competent authority" also fall within any of the clauses (a) to (d) of the definition of "public authority" those persons/authorities would both be the "competent authority" as well as the "public authority". The expressions "competent authority" and "public authority" are not mutually exclusive. The competent authorities and one or more of them may also be the public authorities. Similarly the public authorities or some of them, like the President and the Governor who are the "public authority", may also be the "competent authority". Overlapping is not prohibited either by the RTI Act or by any other law.

17. We are fortified in our view by a decision of the Special Bench (of Three Judges) of Delhi High Court, rendered in *Secretary General, Supreme Court of India vs. Subhash Chandra Agarwal*, (L.P.A. No. 501/2009 decided on 12th January, 2010). In that case, the Chief Justice of India (who is the "competent authority" under section 2(e)(ii) of the RTI Act) was also held to be the "public authority". The fact that the Chief Justice of India (for short "the CJI") was the competent authority did not deter the Court from coming to the conclusion that he was the "public authority" under section 2(h) of the RTI Act. Learned Additional Solicitor General and the Advocate General, however, inviting our attention to paragraph 25 of the decision submitted that the decision that the CJI is a "public authority" was rendered by the Special Bench on the basis of a concession made by the learned Attorney General before it. It is true that the learned Attorney General had conceded before the Special Bench that the finding recorded by the Single Judge that the CJI was a "public authority" and the reasons therefore were correct. However, the Special Bench did not hold that the CJI was a "public authority" only on the basis of the concession of the learned Attorney General. In paragraph 26, the Special Bench has observed: "Notwithstanding the fact that the correctness of the findings respecting point nos.1 & 2 have been fairly conceded by the learned Attorney General for India, we have given our careful consideration to the matter in the overall facts and circumstances of these proceedings. We find ourselves in full agreement with the reasoning set out in the impugned judgment". The Special Bench then set out briefly its reasons for coming to the conclusion that the CJI was a "public authority". The reasons for which the CJI has been held to be the "public authority" notwithstanding he being the "competent authority" apply with equal force for not excluding the President and the Governor from the definition of "public authority". If the

Governor falls under clause (a) of definition of the “public authority” under section 2(h) of the RTI Act, he cannot be excluded from definition for any reason, including the one contended by the learned Additional Solicitor General and the Advocate General. If the Legislature intended to exclude the persons who find place within the definition of the “competent authority” from the definition of “public authority”, nothing prevented the Legislature from so saying. For these reasons, we answer the first part of point no.1 in the affirmative and second part in the negative.

Point No.2

Whether the Governor is a sovereign and being sovereign, no direction can be issued to the Governor for disclosure of any information under the RTI Act?

18. The President of India is the constitutional head of the Union of India. The Governor of a State is the constitutional head of each State, constituting the federation of Union of India. The learned Additional Solicitor General submitted that the position of the President and the Governor is similar. He contended that the President is sovereign and so is the Governor. The Governor being sovereign, no authority, much less the PIO, can issue him any direction. The Governor is not bound to disclose any information asked of him under the RTI Act. The contention cannot be accepted for the reasons indicated below.

19. The theory of sovereignty was explained by Austin. Salmond quotes the theory of sovereignty developed by Austin as : “To Austin a sovereign is any person, or body of persons, whom the bulk of political society habitually obeys, and who does not himself habitually obey some other person or persons”. (Salmond on Jurisprudence, Twelfth Edition, Indian Economy Reprint (2009), page 27).

Dias also follows Austin and summarises the theory of sovereignty in following words:

Sovereignty has a ‘positive mark’ and a ‘negative mark’. The former is that a determinate human superior should receive habitual obedience from the bulk of a given society, and the latter is that that superior is not in the habit of obedience to a like superior.

(Dias Jurisprudence, Fifth Edition, page 348)

Jurisprudentially, in our view, the sovereign is that person or body of persons which receives habitual obedience from the bulk of a given society and does not himself habitually obey some other person or persons. It has two aspects, viz. (i) a bulk of the society obeys him, and (ii) he does not obey any other. The second aspect has been aptly put by Dias in the following words:

Sovereign cannot be under a duty, since to be under a duty implies that there is another sovereign above the first who commands the duty and imposes a sanction; in which case the first is not sovereign.

Applying this test, the President or the Governor cannot be held to be sovereign inasmuch as the President habitually obeys and is required by the Constitution to obey the advice given by the Council of Ministers and so is the Governor. Except in case of some discretionary functions wherein the Governor may act on his own, he is required to act on the advice of the Council of Ministers and so is the President. Though the advice given by the Council of Ministers to the President or the Governor, as the case may be, cannot be regarded as a command, under the constitutional scheme the President and the Governor in the bulk of the matters are bound by the advice rendered by the Council of Ministers. In that sense, it cannot be said that the President and the Governor are not in the habit of obedience to any other person or a body of persons.

20. There are usually three elements of internal sovereignty. The sovereign has a power to make laws (legislative power). He has

a power to enforce laws (executive power) and he has power to decide any dispute or issue, including interpretation of the laws (judicial power). It is true that the President has all the three powers. Power of making laws in respect of the subjects mentioned in the Union list vests in the Parliament. Article 79 of the Constitution provides that there shall be Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People. The President thus, is a part of the Parliament which makes laws. Under Article 123 of the Constitution, the President has power to promulgate Ordinances when both the houses of the Parliament are not in session. The President thus enjoys the legislative power. The President also has the executive power. Under Article 53 of the Constitution, the executive power of the Union vests in the President. The fact that the President is required to act in most of the matters in accordance with the advice of the Council of Ministers does not depart from the fact that the executive power of the Union vests in him. The President also, to an extent, exercises the judicial power. Judicial power is the power to decide an issue or a dispute. If any question arises as to the age of a Judge of a High Court, under Article 217(3) of the Constitution the question is to be decided by the President, after consultation with the Chief Justice of India and the decision of the President is to be final. If a question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Article 102, the question is to be referred to the President and his decision is final under Article 103 of the Constitution. Thus, the President has a power to decide a dispute or a question. The President exercises legislative, executive as well as judicial power. However, that does not make the President a sovereign. In democracy sovereignty vests in the people/ the citizens of the country. Sovereign power of the Democratic Republic of India, which vests

in its citizens is exercised by them through their representatives, be they the Members of Parliament or the Executive or through the titular head, but the ultimate power and sovereignty vests in the people of India. The very preamble to the Constitution begins with the words "We the people of India, having solemnly resolved to constitute Indian into a sovereign socialist secular democratic republic". The preamble recognizes the resolution of the people of India to constitute India into a sovereign socialist secular democratic republic. It is in them that the sovereignty vests, the President being the mere formal head of the State.

21. We will now refer to the various decisions cited before us in regard to the position of the President and the Governor.

22. Our attention was invited to a decision of seven Judges Bench of the Supreme Court in *Samsher Singh vs. State of Punjab*, MANU/SC/0073/1974 : (1974) 2 SCC 831, and particularly to the observations in the concurring judgment of Krishna Iyer, J. in paragraph 138, wherein it is observed: "In short, the President, like the King has not merely been constitutionally romanticised but actually vested with a pervasive and persuasive role". Placing strong reliance on the aforesaid observations, it was submitted that the position of the President was like the King and in fact better than the King; like the King, sovereignty vests in the President in case of the Union and in the Governor in case of a State. Our attention was also invited to the judgment of Ray, C.J. who speaking for the majority, wrote (paragraph 33 of the decision): "This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system". In paragraph 48 of the majority judgment, it is observed: "The President as well as the Governor is the Constitutional or formal head. The President as was the Governor exercises his powers and

functions conferred upon him by or under the Constitution on the aid and advice of Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion". In our view, in Samsher Singh's case the majority has not held that sovereignty vests in the President or the Governor or that they are sovereign. It has only held that the powers of the President and the Governor are similar to the power of the Crown under the British Parliamentary System.

23. In *Bhuri Nath and Others vs. State of J & K and Others*, MANU/SC/1077/1997 : (1997) 2 SCC 745, the Supreme Court followed the decision in the case of *Samsher Singh* (supra) and held that under the cabinet system of Government, as embodied in our Constitution, the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of the Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion (para 19 of the decision). This decision also does not hold that the President and the Governor are sovereign or that the "Internal Sovereignty" vests in them.

24. In *Pu Myllai Hlychho and Others vs. State of Mizoram and Others*, MANU/SC/0027/2005 : (2005) 2 SCC 92, a Constitution Bench of the Supreme Court reiterated that the powers of the President and the Governor were similar to the powers of the Crown under British Parliamentary system, but also held (para 15) that "Whenever the Constitution requires the satisfaction of the Governor for the exercise of any power or function, the satisfaction required by the Constitution is not personal satisfaction of the Governor but the satisfaction in the Constitutional sense under the cabinet system of Government."

25. None of the three decisions cited on behalf of the petitioners and referred to above indicates that the President or the Governor is the sovereign and/or that the sovereignty vests in them. All the decisions indicate that the President and the Governor are formal heads of the State and the executive powers of the Union and the State, as the case may be, vests in them. However, they have to exercise the powers as provided in the Constitution of India, on the aid and advice of the Council of Ministers in view of the cabinet system of governance adopted by the Constitution. Indeed, the fact that the President and the Governor are bound by the advice of the Council of Ministers militates against the Austin's concept of "Sovereignty", namely that the sovereign "habitually does not obey some other person or persons". Under the Constitution, the President and the Governor obey and are bound by the decisions of the cabinet, save and except, in exceptional circumstances where they can act in their discretion in certain matters.

26. In case of a monarchy, governed by an unwritten constitution, the King is the sovereign and enjoys an absolute immunity from any judicial process. The judiciary may in fact owe its existence to the King. No action of the King can be questioned. But that is not so in case of a country governed by a written constitution. The Head of the State, in whom the sovereignty may seemingly vest under the written constitution exercises sovereign powers and enjoys sovereign immunity only to the extent to which they are granted by the written constitution. We would have an occasion to consider later the extent of sovereign immunity enjoyed by the President and the Governor under Article 361. What needs to be stated here is that save and except the immunity which is granted under Article 361, the President and the Governor do not enjoy any other sovereign immunity from disclosure of information under the RTI Act.

27. A distinction between the sovereign and non-sovereign functions of the State must also to be borne in mind. In a war with another country, the military while using its arms and ammunitions may accidentally causes damage to the property of a citizen. In such a case, the State would enjoy a sovereign immunity and may not be liable to pay compensation for the loss suffered by the citizen in a military action against a foreign country. But that does not mean that the State would enjoy sovereign immunity in respect of its non-sovereign functions. A damage caused by a military truck while moving on a public road carrying children of the officers to the school would give rise to claim damages and the State would not be able to claim sovereign immunity. We are of the view that in respect of non-sovereign functions performed by the Governor, he would not be entitled to claim freedom from law on the basis of sovereign immunity. His non-sovereign functions and actions would be subject to law of the land. He would be bound by the RTI Act and would not be able to claim any sovereign immunity from disclosing information in respect of his non-sovereign functions. In this connection, a reference may be made to the exemption provided under clause (a) of section 8(1) of the RTI Act which exempts disclosure of an information which would prejudicially affect the sovereignty and integrity of India, amongst other things. The exemption against disclosure of an information under the RTI Act is restricted in respect of sovereign functions of the President or the Governor only to the extent it is protected under section 8(1)(a) of the RTI Act or under Article 361 of the Constitution and no more.

Point No.3

What is the extent of immunity enjoyed by the Governor under Article 361 of the Constitution of India? And whether in view of such immunity, no direction can be issued to an no order can be passed under the RTI Act, which has an

effect of requiring the Governor to disclose any information under the RTI Act?

28. The question of immunity granted to the President and the Governor under Article 361 of the Constitution came up for consideration before a Constitution Bench of the Supreme Court in Rameshwar Prasad and Others (VI) Vs. Union of India and Another, MANU/SC/0399/2006 : (2006) 2 SCC 1 to which our attention was invited by Mr. Nadkarni, learned counsel appearing for the respondent. After considering its earlier decision in Union Carbide Corporation and Others Vs. Union of India and Others, MANU/SC/0058/1992 : 1991(4) SCC 584, and the decisions of Bombay, Madras, Calcutta and Nagpur High Court, Sabharwal, C.J., speaking for the majority observed:

179. The position in law, therefore, is that the Governor enjoys complete immunity. The Governor is not answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of mala fides.

Pasayat, J, in a partly dissenting Judgment, has also concurred with the majority on the question of scope of immunity enjoyed by the Governor under Article 361 of the Constitution. In paragraph No.281(6) of the judgment he has observed:

281. So far as the scope of Article 361 granting immunity to the Governor is concerned, I am in respectful agreement with the view expressed by the Hon'ble the Chief Justice of India:

(6)In terms of Article 361 the Governor enjoys complete immunity. The Governor is not answerable to any court for exercise and performance of powers and duties of his office or for any act done or purporting to be done by

him in the exercise of those powers and duties. However, such immunity does not take away power of the Court to examine the validity of the action including on the ground of mala fides.

29. The law on the subject as laid down by the Supreme Court in the case of Rameshwar Prasad (supra) appears to be: Though the Governor enjoys complete immunity and is not answerable to any Court for the exercise and performance of the powers and duties of his office and for any act done or purporting to be done by him in exercise and performance of his powers and duties, but the immunity granted by Article 361(1) does not take away the powers of the Court to examine the validity of his action, including on the ground of mala fides. When an application is made to the PIO in the Office of the Governor by a citizen for disclosure of an information in possession of the Governor, the PIO would ordinarily seek views of the public authority on the application. If the public authority (including the Governor) has no objection for disclosure of the information, no difficulty would arise and the information would be disclosed to the applicant. If the public authority raises objection to the disclosure, either in the form of exemption under section 8 of the RTI Act or on the ground mentioned in Section 9 of the RTI Act, or any other ground permissible in law, the PIO would then be required to decide whether the information is so exempt and/or is not liable for disclosure to the citizen making the application. If the decision of the PIO or of the appellate or the second appellate authority as the case may be, is that the information is required to be disclosed and is not exempt from disclosure an order of disclosure would be issued. In our view the public authority, be it Governor or anybody else, would then be required to disclose the information. Any direction so issued, in our considered opinion, would not enjoy any immunity under Article 361 of the Constitution.

30. We may refer to the oath which the Governor takes under Article 159 of the Constitution of India. The Article itself gives the form of the oath which reads as follows:

I, A.B., do swear in the name of Goa /solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of..... (name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of..... (name of the State)

The Governor, before assuming his office, takes an oath not only to preserve, protect and defend the Constitution, but also the law. He is bound by the oath taken by him. If the law requires disclosure of an information and if it is so held by the PIO or the first appellate authority or the State Information Commission (which is the final appellate authority) in accordance with the RTI Act, in our considered view, the Governor by virtue of the oath of office he takes, is bound to obey the decision and disclose the information, or else, he would not be defending the law i.e. the RTI Act.

Point No.4

Whether the Report of the Governor made to the President under Article 356 of the Constitution is exempt from disclosure under clause (e) of section 8 of the RTI Act?

31. Clause (e) of sub-section (1) of section 8 of the RTI Act reads as follows:

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give to any citizen-

(e) Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.

The essential ingredients for applicability of clause (e) of sub-section (1) of section 8 of

the RTI Act are (i) there must exist a fiduciary relationship between two persons, (ii) the information must be available with the latter person (public authority to whom request for disclosure of information is made) in his fiduciary relationship with the former person (person regarding whom the information relates or who has given or transmitted the information), (iii) the competent authority must not be satisfied that the larger public interest warrants the disclosure of such information. In order to test the claim of exemption made by the appellant of exemption under section 8(1)(e) of the RTI Act, it would be necessary to examine (i) the nature of relationship between the President and the Governor, (ii) whether the report made by the Governor under Article 356 of the Constitution is made in pursuance of any fiduciary relationship between the two, and (iii) whether the person who is an author of the report (the Governor) can claim exemption under section 8(1)(e) or is it only the recipient (the President) who would be entitled to claim exemption under clause (e) of sub-section (1) of section 8 of the RTI Act.

32. Black's Law Dictionary, Eighth Edition, defines the word "fiduciary" as follows:

Fiduciary -1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship one who owes to another the duties of good faith, trust, confidence, and candor (the corporate officer is a fiduciary to the corporation). 2. One who must exercise a high standard of care in managing another's money or property (the beneficiary sued the fiduciary for investing in speculative securities) -fiduciary, adj.

'Fiduciary' is a vague term, and it has been pressed into service for a number of ends..... My view is that the term 'fiduciary' is so vague that plaintiffs have been able to claim that fiduciary obligations have been breached

when in fact the particular defendant was not a fiduciary *stricto sensu* but simply had withheld property from the plaintiff in an unconscionable manner." D.W.M. Waters, *The Constructive Trust* 4 (1964).

33. Concise Oxford English Dictionary (Indian Edition), Eleventh Edition, Revised, defines the word "fiduciary" as follows:

fiduciary-adj. 1. Law involving trust, especially with regard to the relationship between a trustee and a beneficiary, 2. Finance (of a paper currency) depending for its value on securities or the reputation of the issuer.

34. Despite the vagueness of the term "fiduciary", attempts have been made by Law Dictionaries to define the word "fiduciary". The definitions indicate that a person would hold a fiduciary relationship with another if the former, in the scope of his relationship owes to the latter the duties of good faith, trust, confidence and candor. The fiduciary relationship can be best described not by definition but by illustrations. The relationship between a director of a company and the company; a lawyer and his clients; a doctor and his patients, a banker and its constituent, an executor and the beneficiary under a Will; are often cited as examples of fiduciary relationship. A common thread amongst these relationships is the position of a trust held by the former (fiduciary) in relation to the latter (beneficiary). A director of a company holds the position of trust for the company in the sense he must act in the interest of the company. In *Sangramsinh P. Gaikwad v. Shantadevi P. Gaikwad*, MANU/SC/0052/2005 : (2005) 11 SCC 314, it was held that the director does not hold a position of a trust qua the shareholders except where any special contract or arrangement may have been entered into between directors and shareholders or any special relationship or circumstances exist in a particular case. As

between a lawyer and his client, the lawyer acts for the benefit of his client and is not permitted to share the fruits of the litigation (champarty being prohibited in India). A doctor treats his patient and prescribes medicine for his benefit and not merely for a research, except where specific consent of the patient is so obtained. An executor of a Will administers the estate of the testator for the benefit of the legatees and not for his own benefit. If this test of existence of trust is applied, it is difficult to subscribe to the proposition that the President holds a fiduciary relationship qua the Governor. Undoubtedly, the appointment of a Governor is made by the President and is terminable by the President, though the President acts in doing so on the advice of Council of Ministers. The President in a sense holds some authority on the Governor. He can call for a report from the Governor if one is not made suo motu by the Governor under Article 356 of the Constitution regarding the situation in a State so as to ascertain whether a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution. But the President does not act as a trustee for the Governor nor does he act to protect the interest of the Governor. In that sense, there is no relationship of a trustee and a beneficiary. There is no duty in the President to act for the benefit of the Governor and the relationship between them cannot be regarded as fiduciary *stricto sensu*.

35. The report which the Governor makes to the President under Article 356 of the Constitution is about the situation and state of affairs in the State of which he is the Governor. Under sub-clause (1) of Article 356 of the Constitution, the Governor makes a report to the President as to whether a situation has arisen in the State in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The

report of the Governor is made in pursuance of his constitutional duty to inform the President where a situation arises that the Government of the State of which he is the Governor is unable to or otherwise cannot be carried on in accordance with the provisions of the Constitution. This report is not made in performance of any fiduciary duty. In fact, the President or the Governor do not hold any fiduciary relationship in relation to the report to be made by the Governor under Article 356 of the Constitution. In making the report the Governor performs his constitutional obligation, an obligation far higher than an obligation in trust. It therefore cannot be said that the report of the Governor made under Article 356 of the Constitution is an information received by the President in a fiduciary capacity.

36. For the sake of arguments, even if it is assumed that the report made by the Governor to the President under Article 356 of the Constitution, is sent in a fiduciary capacity, the exemption available under section 8(1)(e) of the RTI Act would be available only to the recipient of the information (report), i.e. the President. The exemption under clause (e) of sub-clause (1) of section 8 of the RTI Act can be claimed only by the recipient and cannot be claimed by a person who is an author of the information or who gives the information. Clause (e) of sub-clause (1) of section 8 of the RTI Act says "information available to the person in fiduciary relationship". Even if it is assumed that the report is available with the President in a fiduciary relationship, it is he who can claim exemption when a disclosure is sought from him. Clause (e) of sub-clause (1) of section 8 of the RTI Act does not exempt the giver of an information to claim an exemption.

For all these reasons, it must be held that the Governor cannot claim an exemption under clause (e) of sub-clause (1) of section 8 of the

RTI Act in respect of disclosure of a report made by him under Article 356 of the Constitution.

Point No.5

Whether a State Information Commission has to be a multi-member body? What is the effect of an order passed by the State Information Commission when it is reduced to a sole member body?

37. By a notification dated 2nd March 2006 published in the Gazette, Extraordinary no.2 dated 3rd March 2006, the State of Goa constituted "the Goa State Information Commission" consisting of State Chief Information Commissioner and the State Information Commissioner. Mr. N.S. Keni was appointed as the State Chief Information Commissioner and Mr. Afonso Araugo was appointed as the State Information Commissioner and the two together constituted the State Information Commission. However, the State Information Commissioner retired on attaining age of 65 years and no new appointment has been made in his place. The result is that the Goa State Information Commission consists of only the State Chief Information Commission and is reduced to a single member body. It is this single member Commission which passed the order dated 31st March 2011 that is impugned in Writ Petition No. 237 of 2011.

38. Learned Additional Solicitor General appearing for the appellant submitted that under section 15 of the RTI Act, the State is required to constitute the State Information Commission and such Information Commission has to be a multi-member body. The State Information Commission cannot function with only one member. The order passed by the State Information Commission consisting of only one member is not in accordance with law and is liable to be set aside. In support of his submission, he referred to and relied

upon a decision of the Himachal Pradesh High Court in Virendra Kumar vs. P.S. Rana, MANU/HP/0077/2007 : AIR 2007 HP 63 and of the High Court of Calcutta in Tata Motors Ltd. vs. State of West Bengal (Writ Petition No. 1773 of 2008 decided on 12.1.2010, Coram: Dipankar Datta, J.).

39. Per contra, the respondent no.3 appearing in person submitted that the law does not require that the State Information Commission to be a multi-member body. The State Information Commission can consist of the Chief Information Commissioner as a sole member. When the Chief Information Commissioner is the sole member, he can act alone. Even when the State Information Commission is a multi-member body, the distribution of the work amongst the members (State Information Commissioners) is to be done by the Chief Information Commissioner and he can assign any complaint under section 18 of the RTI Act to any one of the State Information Commissioners including himself and an order passed by one member of State Information Commission is valid. If so, the order passed by the State Chief Information Commissioner acting solely and alone is a valid order. In support, he referred to and relied upon a decision of a Single Judge of this Court in Shri Lokesh Chandra vs. State of Maharashtra (Writ Petition No. 5269 of 2008 decided on 1st July 2009 -Coram: C.L. Pangarkar, J.).

40. Chapter IV of the RTI Act, which consists of sections 14 to 17, relates to the State Information Commission. Section 15 requires every State to constitute a State Information Commission. Sub-section (1) of section 15 says that every State Government shall, by notification in official gazette, constitute a body to be known as "(Name of the State) Information Commission" to exercise the powers conferred on and to perform functions assigned to it under this Act. Sub-sections

(1) to (4) of section 15 are material and read thus:

15. Constitution of State Information Commission-

- (1) Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the..... (name of the State) Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.
- (2) The State Information Commission shall consist of-
 - (a) the State Chief Information Commissioner, and
 - (b) such number of State Information Commissioners, not exceeding ten, as may be deemed necessary.
- (3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of-
 - (i) the Chief Minister, who shall be the Chairperson of the committee;
 - (ii) the Leader of Opposition in the Legislative Assembly; and
 - (iii) a Cabinet Minister to be nominated by the Chief Minister.

Explanation.-For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognised as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of Opposition.

- (4) The general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner who shall be

assisted by the State Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State Information Commission autonomously without being subjected to directions by any other authority under this Act.

Conjoint reading of sub-sections (1) to (4) of section 15 of the RTI Act leaves no doubt in our mind that the State Information Commission has to be a multi-member body. Sub-section (2) in clear words states that the Commission shall consist of the State Information Commissioner and such number of State Information Commissioners, not exceeding ten, as may be deemed necessary. Though a discretion has been conferred on the State to decide the number of State Information Commissioners not exceeding ten, that does not mean that the State has discretion not to appoint even a single State Information Commissioner. Clauses (a) and (b) of sub-section (2) of section 15 of the RTI Act are joined by a conjunctive article "and". The conjunction "and" contemplates that the State Information Commission shall consist of at least two members, one State Chief Information Commissioner and at least one more State Information Commissioner. We also note that the Government of Goa by its notification dated 2nd March 2006 has constituted Goa State Information Commission to consist of Chief Information Commissioner and one State Information Commissioner.

41. We are in agreement with the view expressed by the Single Judge of the Himachal Pradesh High Court in Virendra Kumar vs. P.S. Rana (supra), and in particular para 15 thereof and by the Calcutta High Court in Tata Motors vs. State of West Bengal (supra), that the State Information Commission has to be a multi-member body.

42. In *Lokesh Chandrav. State of Maharashtra* (supra), a Single Judge of this Court was mainly concerned with sub-section (4) of section 15 of the RTI Act. Sub-section (4) of section 15 prescribes that general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner and he shall be assisted by the State Information Commissioners. Interpreting sub-section (4) of section 15 of the RTI Act, the Court held that the State Chief Information Commissioner has a right to decide which appeals are to be heard by whom. The State Information Commissioner can hear only those appeals which may be made over to him and cannot make a grievance for withdrawal of any appeal from him by the State Chief Information Commissioner. In short, the Court held that the powers of the State Chief Information Commissioner regarding assignment of appeals are similar to the powers of the Chief Justice of a High Court who decides the roster and decides who should hear which appeal. In *Lokesh Chandra's* case, the Court was not required to consider whether the State Information Commission can consist of only one member, namely the State Chief Information Commissioner. This decision does not lay down that the State Information Commission can consist of only one member. In any event, we are of the considered view that the State Information Commission has to be a multi-member body and must consist of State Chief Information Commissioner and at least one more State Information Commissioner. Since at the relevant time, the Goa State Information Commission consisted of only one member, namely State Chief Information Commissioner, though the RTI Act and the Government contemplates it to be a multi-member body, it was not properly constituted and could not have exercised the powers under section 18 of the RTI Act. In this view of the

matter, it is not necessary for us to consider the last leg of the argument of the learned Additional Solicitor General that the State Information Commission ought not to have entertained the application under section 18 of the RTI Act as the respondent no. 3 in Writ Petition No. 237 of 2011 had a remedy by way of an appeal under section 19 of the RTI Act against the order dated 19th November 2009 of the Public Information Officer declining to disclose information.

CONCLUSIONS

43. For the reasons mentioned above, we record our conclusions as follows:

Point No.1: The Governor is a public authority within the meaning of section 2(h) of the RTI Act. He would not cease to be a public authority by reason of the fact that he is also a competent authority under section 2(e) of the RTI Act.

Point No.2: The Governor is not sovereign and sovereignty does not vest in him. The contention that by reason of he being sovereign no direction can be issued to the Governor for disclosure of any information under the RTI Act, cannot be accepted.

Point No.3: By reason of Article 361 of the Constitution of India, the Governor enjoys complete immunity and is not answerable to any Court in exercise and performance of the powers and duties of his office and any act done or purporting to be done by him in exercise and performance of his duties; but the immunity granted under Article 361(1) of the Constitution of India does not take away the powers of the Court to examine the validity of his actions including on the ground of mala fides. [See *Rameshwar Prasad vs. Union of India*, MANU/SC/0399/2006 : (2006) 2 SCC 1]. The Governor or the PIO in his office cannot claim immunity from disclosure of any information under the RTI Act.

Point No.4: The relationship between the President of India and the Governor of a State is not fiduciary. The President cannot be said to hold a fiduciary position qua the Governor of a State. Consequently, the information sought for by the respondent no.1 in Writ Petition No. 478 of 2008, i.e. a copy of the report made by the Governor to the President (through the Home Minister) under Article 356(1) of the Constitution of India is not exempt from disclosure under section 8(1)(e) of the RTI Act.

Point No.5: The State Information Commission has to be a multi-member body consisting of

the State Chief Information Commissioner and at least one (but not exceeding ten) State Information Commissioner/s. The State Information Commission cannot function only with one member.

44. For these reasons, Writ Petition No. 478 of 2008 is dismissed. However, Writ Petition No. 237 of 2011 however is allowed the impugned order dated 31st March 2011 (Annexure “K” to that writ petition) passed by the Goa State Information Commission is quashed and set aside. In the facts and circumstances, the parties shall bear their own costs.

IN THE HIGH COURT OF DELHI

LPA No. 1090/2011

Decided On: 24.05.2012

Appellants: **Central Board of Secondary Education**

Vs.

Respondent: **Sh. Anil Kumar Kathpal**

Hon'ble Judges:

Hon'ble The Acting Chief Justice and Mr. Justice
Rajiv Sahai Endlaw

Subject: Right to Information

JUDGMENT

Rajiv Sahai Endlaw, J.

1. This intra-court appeal impugns the judgment dated 07.12.2011 of the learned Single Judge dismissing W.P. (C) No.8532/2011 preferred by the appellant. The said writ petition was filed by the appellant assailing the order dated 27.09.2011 of the Central Information Commission (CIC) allowing the appeal of the respondent. The daughter of the respondent passed the Class X examination held by the appellant in the year 2010 and her result declared by the appellant was as under:

SUB CODE	SUB NAME	GRADE	GRADE POINT
101	ENGLISH COMM.	A2	09
002	HINDI COURSE-A	A1	10
041	MATHEMATICS	A1	10
086	SCIENCE	A1	10
087	SOCIAL SCIENCE	A1	10

2. The respondent, under the provisions of the Right to Information Act, 2005, sought from the appellant the actual marks secured by his daughter in each subject for the reason "this information will help me to identify her weak areas in studies and take timely action, so that

she can pursue her career after XII. I hereby certify that I will neither reveal the above information to her nor put any pressure on her."

3. The Information Officer of the appellant informed the respondent that with the introduction of the grading system at secondary examination with effect from the year 2010, the appellant had done away with intimating marks and therefore the information sought could not be provided.

4. The respondent preferred the statutory first appeal which was dismissed observing that:

- i) the National Policy on Education 1986 and Programme of Action 1992 had provided for recasting of the examination system and suggested that grades be used in place of marks;
- ii) that the National Curriculum Framework 2005 also envisaged an evaluation system which would grade the students on their regular activities in the classroom and enable students to understand and focus on their learning gaps and learn through these as part of Formative Assessment;
- iii) that the introduction of grades in the examination had been debated by the appellant also and after holding countrywide consultations and deliberations with eminent educationists and experts, the nine point grading system had been introduced

in the secondary school examination from the year 2010;

- iv) The system of declaring subject wise marks had thus been replaced by subject wise grades and grade point;
- v) the purpose of introducing the grading system was to take away the frightening judgmental quality of marks, to lead to a stress free and joyful learning environment and was intended to minimize misclassification of students on the basis of marks, to eliminate unhealthy cut-throat competition and to reduce societal pressure etc.

The order denying information as to marks was thus upheld.

5. The respondent pursued the matter before the CIC. It was the contention of the appellant before the CIC also that, to provide specific marks would be contrary to the policy of introducing the grading system and would undo the grading system. However the appellant, on enquiry by the CIC, confirmed that the marks awarded were available with the appellant in their data. The CIC held that since, the marks were available with the appellant and since none of the exemptions under the RTI Act were attracted to support the non disclosure thereof, the appellant was bound to and directed to provide the information sought.

6. It was the argument of the appellant before the learned Single Judge also that disclosure of the marks would dilute and defeat the grading system. The learned Single Judge however held that since the respondent was seeking disclosure of marks, only of his daughter and further since his daughter who has since attained majority had also consented to the same and since the respondent was not seeking disclosure of marks obtained by other students and further since the appellant was possessed of the information sought, it was required to disclose the same. It was further observed that

a student is entitled to know the marks secured by him / her.

7. Notice of this appeal was issued and the operation of the impugned order stayed. The respondent appearing in person has been heard. Though opportunity was given to the appellant to file written arguments but no written arguments were filed.

8. The documents filed by the appellant show that the appellant, vide its letter dated 29.09.2009 to the Heads of all the Institutions affiliated to it, while introducing the system of Grading at Secondary School level, explained the evaluation process as under:

2.3 In this system, student's performance will be assessed using conventional numerical marking mode, and the same will be later converted into the grades on the basis of the pre-determined marks ranges as detailed below:

MARKS RANGE	GRADE	GRADE POINT
91-100	A1	10.0
81-90	A2	9.0
71-80	B1	8.0
61-70	B2	7.0
51-60	C1	6.0
41-50	C2	5.0
33-40	D	4.0
21-32	E1	--
20 and below	E2	--

The operational modalities were prescribed in the said letter as under:

4. Operational Modalities

4.1 The student's performance shall be assessed using conventional method of numerical marking.

4.2 The 'Grades' shall be awarded to indicate the subject wise performance. 4.3 The 'Grades' shall be awarded on a nine point scale as per Table at para 2.3.

4.4 Only subject wise grades shall be shown in the "Statement of Subject wise Performance" to be issued to all candidates.

4.5 Subject-wise percentile score / rank at the National level shall be provided to the schools on demand.

9. The appellant has also placed before us the judgment of Division Bench of this Court in Independent Schools' Federation of India (Regd.) Vs. Central Board of Secondary Education MANU/DE/3352/2011 : 183(2011) DLT 211 upholding the grading system introduced by the appellant and dismissing the challenge thereto. The challenge to the grading system, in the said proceeding also was inter alia on the ground that replacing marks by grades was only a cosmetic change and would mar the quality of education and the concept of grading was virtually an eye-wash. Needless to state that the said challenge was also found to be without any basis and rejected.

10. What we find to have prevailed with the CIC and the learned Single Judge is that, despite introduction of grading system, marks existed with the appellant; it was held that once the information sought was available, there could be no denial thereof. What also prevailed was that the respondent was seeking marks only of his ward and not of other students and thus there could be no objection to disclosure thereof. The CIC also observed that the information sought was not exempt.

11. We are unable to agree; we feel that the CIC as well as the learned Single Judge, by directing disclosure of "marks", in the regime of "grades" have indeed undone what was sought to be done by replacing marks with grades and defeated the very objective thereof. The objective, in replacing the marks with grades, as can be gathered from the documents on record, was to grade students in a bandwidth rather than numerically; it was felt that difference, between a student having 81%

and a student having 89%, could be owing to subjectivity in marking and there was no reason to otherwise consider a bearer of 81 percentile to be inferior to a bearer of 89 percentile and there was no reason to treat them differently. It was thus decided to place both in grade A2 with grade point 9 as aforesaid. Though ideally, the examiner in such cases ought to give both of them grade A2 only, without giving them 81% and 89% as aforesaid but it appears that since the teachers and examiners also, owing to the long past practice were used to marking instead grading students, for their guidance, the range was prescribed as aforesaid. Thus it appears that though the marks are available but in law and fact they ought not to have been available. The marks appear to be available with the appellant only owing to the examiners and teachers being not immediately accustomed to grading and for their convenience.

12. The question which arises is, whether the information which ought not to have been there as per the changed policy upheld by the Court can be treated as information within the meaning of the RTI Act. In our opinion no. Information which is forbidden by law or information of a nature, if disclosed, would defeat the provisions of any law or disclosure whereof is opposed to public policy, cannot be regarded as "lawful" and is to be ignored and no disclosure thereof can be made or directed to be made.

13. No doubt, as the CIC also has observed, none of the clauses of Section 8, if literally interpreted, are attracted. However while interpreting a statutory provision, we cannot shut our eyes to hard realities, to what was sought to be achieved thereby and cannot in a pedantic manner allow the literal interpretation to run amok and create a situation not intended by the statute. Moreover, a reading of the provisions of the RTI Act in the manner done by the CIC and the learned Single Judge would bring it in conflict with other laws and

notwithstanding the overriding effect given thereto by Section 22 thereof, the first attempt has to be to harmonise its provisions with other laws. Once a purposive interpretation is given to Section 8, it will be found that information forbidden to be published [Section 8(1)(b)] and information available in fiduciary relationship [Section 8(1)(e)] is exempt. In our opinion, even though there is no express order of any court of law forbidding publication of marks [as is the want of Section 8(1)(b)] but the effect of bringing the regime of grades in place of marks and of dismissal of challenge thereto, is to forbid publication/disclosure of marks. Similarly, in the evaluation process prescribed by appellant, for guidance of its examiners, marks are only to arrive at a grade, perhaps as aforesaid to acquaint the examiners with the grading system and as a transitory stage in the shift from marks to grades.

14. The Supreme Court in *Kailash Chand v. Dharam Das* (MANU/SC/0355/2005 : 2005) 5 SCC 375 reiterated that a statute can never be exhaustive and legislature is incapable of contemplating all possible situations which may arise in future litigation and in myriad circumstances and it is for the Court to interpret the law with pragmatism and consistently with demands of varying situations. The legislative intent has to be found out and effectuated. Earlier also in *Smt. Pushpa Devi v. Milkhi Ram* MANU/SC/0149/1990 : (1990) 2 SCC 134 the same sentiment was expressed by holding that law as creative response should be so interpreted to meet the different fact situations coming before the court, for Acts of Parliament were not drafted with divine prescience and perfect clarity and when conflicting interests arise, the court by consideration of legislative intent must supplement the written word with force and life. Lord Denning (in *Seaford Estate Ltd. v. Asher* (1949) 2 KB 481) observing that the judge must consciously seek to mould the law so as to serve the needs of time and must

not be a mere mechanic, was quoted with approval.

15. The Supreme Court recently in *The Institute of Chartered Accountants of India v. Shaunak H. Satya* MANU/SC/1006/2011 : (2011) 8 SCC 781, in the context of the RTI Act itself held that in achieving the objective of transparency and accountability of the RTI Act other equally important public interests including preservation of confidentiality of sensitive information, are not to be ignored or sacrificed and that it has to be ensured that the revelation of information in actual practice, does not harm or adversely affect other public interests including of preservation of confidentiality of sensitive information. We have already held above that disclosure of marks, which though exists with the appellant would amount to allowing play to the policy earlier prevalent of marking the examinees. Merely because the appellant/its examiners for the purpose of grading, first mark the students would not compel this court to put at naught or to allow full play to the new policy of grades.

16. No weightage can also be given to the submission of the respondent that the marks even if disclosed would not be used for any other purpose. Such an offer cannot be enforced by the Court and the Court cannot on the basis thereof allow disclosure of something which was not intended to exist in the first place. The possibility of the respondent and his ward, in securing admission and for other purposes using the said information to secure an advantage over others cannot be ruled out. We are therefore unable to agree with the reasoning of the CIC and of the learned Single Judge and allow this appeal. We hold the information, disclosure of which was sought, to be no information and also exempt from disclosure. We allow this appeal as well as the writ petition preferred by the respondent and set aside the order dated 27.09.2011 of the CIC.

No order as to costs.

IN THE HIGH COURT OF DELHI

LPA No. 900/2010

Decided On: 23.03.2012

Appellants: **Bharat Sanchar Nigam Ltd.**

Vs.

Respondent: **Shri Chander Sekhar**

Hon'ble Judges:

Hon'ble Acting Chief Justice A.K. Sikri and
Hon'ble Mr. Justice Rajiv Sahai Endlaw

Subject: Right to Information

JUDGMENT

Rajiv Sahai Endlaw, J.

1. This Intra-Court appeal impugns the judgment dated 03.05.2010 of the learned Single Judge dismissing W.P. (C) No. 2946/2010 preferred by the appellant. The said writ petition was preferred impugning the order dated 10.11.2009 of the Central Information Commission (CIC) allowing the appeal filed by the respondent and directing the appellant to disclose the information sought. The appellant had floated a tender titled "GSM Phase-VI" for the installation of 93 million GSM lines in four parts. M/s KEC International Ltd. was one of the bidders in the said tender. The respondent, claiming to be one of the shareholders of the said KEC International Ltd., on 02.07.2009 applied under the provisions of the Right to Information Act, 2005 seeking the following information:

- a. Copy of the complete Report of Evaluation of Tender on the Financial Bids received from various bidders against Part 3 of Tender No. IMPCS/PHASE VI/WZ/CGMT-MH/2008-09/1 dated 01.05.2009 opened on 28.02.2009 for West Zone;

- b. Copy of the complete Report of Evaluation of Tender on the Financial Bids received from various bidders against Part 3 of Tender No. CTD/IMPCS/TENDER/ PHASE VI/2008-09 dated 01.05.2009 opened on 28.02.2009 for East Zone;
- c. Copy of the complete Report of Evaluation of Tender on the financial Bids received from various bidders against Part 3 of Tender No. CMTS/PB/P&D/PHASE VI/25M/TENDER/2008-09 dated 01.05.2009 opened on 28.02.2009 for North Zone;
- d. Copy of the complete Report of Evaluation of Tender on the Financial Bids received from various bidders against Part 3 of Tender No. TA/Cellone/SZ/2008/01 dated 01.05.2009 opened on 28.02.2009 for South Zone.

The respondent further claimed that by then the financial bids had been opened in February, 2009 and evaluation thereof was over.

2. The CPIO of the appellant vide letter dated 30.07.2009 declined the request of the respondent for information on the ground that the information sought was of "commercial confidence" in nature and claiming exemption from disclosure under Section 8(1)(d) of the Act.

3. The respondent preferred first appeal contending that, the appellant was a Government of India enterprise carrying on

works in public interest, utilizing government funds; that the tenders were open tenders; the financial bids were already read out to other bidders at the time of opening of the bids and nothing confidential remained therein; that the bidding process having attained finality, no issues of commercial confidence remained. The first appellate authority however vide order dated 08.09.2009 confirmed the order of the CPIO, also for the reason of the appellant having signed Non Disclosure Agreements with all the participating vendors and the disclosure of the information sought being in violation of the said agreement.

4. The CIC in its order dated 10.11.2009 allowing the appeal of the respondent observed / held, i) that the evaluation process stood completed and thus the commercial position of any of the bidders could not be adversely affected by such disclosure; ii) the exemption under Section 8(1)(d) of the Act is not available since the information was already in public domain owing to the finalization and completion of the bidding process and evaluation and cannot pose a threat to the competitive position of any of the bidders; iii) it was in the larger public interest to disclose such information; iv) that the Non Disclosure Agreements were valid only for the "Confidentiality Period" i.e. till the opening of the bids; v) even otherwise such Non Disclosure Agreements debarring access to information and thereby disrupting the transparency and accountability of the public authority were in violation of the very spirit of the Act and therefore illegal to the extent they prevented disclosure beyond what was exempted under the Act; vi) that thus the Non Disclosure Agreements if prevented disclosure beyond the confidentiality period also, were illegal; vii) that the public interest "far outweighs the weak contentions put up by the appellant to protect the so called private interests"; viii) that even though the tender process had been challenged in some of the

High Courts but the same also did not entitle the appellant to exemption. Accordingly, directions for disclosing the information were issued.

5. The learned Single Judge dismissed the writ petition preferred by the appellant impugning the order aforesaid of the CIC observing / holding, a) that the writ petition filed by KEC International Ltd. impugning the tender process had been finally dismissed by the Supreme Court finding no illegality in the decision making process and declaring the party which was awarded the contract as the lowest bidder - thus the objection to disclosure of information on the ground of the matter being sub judice did not survive; b) that the plea of the appellant of the confidentiality period as per the Non Disclosure Agreements being in vogue for the reason of the formal contract having not been entered into with the successful bidder was of no avail since the bidding process was complete and the selection of the successful bidder stood finalized; c) again for the reason of the bidding process having stood completed, the question of the commercial interest of any of the bidders being adversely affected by the disclosure did not arise; d) Section 22 of the Act gives effect to the provisions of the Act notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act - consequently the Non Disclosure Agreements cannot be used by the appellant to defeat the right to information under the Act; e) even otherwise the Non Disclosure Agreements cannot be said to extend beyond the confidentiality period defined in the agreement itself as the period between the opening of the tender and the finalization of the bids.

6. It was the contention of the appellant before this Bench that the bids in the tender aforesaid had never been given the shape of the contract

and had been cancelled. This Bench before issuing notice of the appeal directed the filing of an affidavit in this regard by the Chairman of the appellant. An affidavit dated 24.01.2011 has been filed informing that the bids were evaluated and L1, L2 etc. selected for Part-III and price negotiations held with L1; that after negotiations the rates were recommended by the Negotiation Committee to the competent authority for finalization / approval; that since the case pertaining to GSM Phase-VI was being examined qua the allegation of irregularity, the competent authority in its wisdom cancelled / scrapped the tender; as a result of the scrapping, no contract came into existence and even the Advance Purchase Order was not issued; that thus no question of giving any kind of information arose; that making public the confidential information of the tenderers particularly in view of signing of the Non Disclosure Agreements would certainly affect the goodwill of the appellant and would result in reduction in number of participating vendors / tenderers in subsequent tenders floated by the appellant and which would further result in monetary loss as due to reduction in competition there would be an increase in prices.

7. The appellant during the hearing has placed reliance on judgment of this Court in Exmar NV Vs. Union of India 2006 (1) RAJ 229 (DB) on the aspect of when the contract can be said to be concluded. It has further been contended that the learned Single Judge has failed to notice Clause 18 of the Non Disclosure Agreement where under the obligations of confidentiality were to survive the expiration or termination of the agreement, for a period of two years from the date the confidential information was disclosed or the completion of business purpose, whichever is later. It is yet further urged that the learned Single Judge has wrongly assumed that the contract stood awarded to the successful bidder.

8. Per contra, the respondent in the reply filed to the appeal has pleaded that the appellant in spite of numerous representations and Court cases averring irregularities, stonewalled and did not come clean; that ultimately on representations to the Prime Minister's Office, a High Powered Committee was constituted which found irregularities in the evaluation process and recommended the scrapping of the tender; that the objection of the appellant to disclosure of information is not for protection of the commercial and confidential information furnished by any of the bidders but to safeguard its own misdeeds during the evaluation process; that the Non Disclosure Agreements signed by the appellant with the bidders are contrary to the spirit of the Act and illegal; that the reluctance of the appellant to disclose information relating to the tender which had already been scrapped was incomprehensible; that the commercial confidentiality of bids is over once the financial bids are opened and prices of all items of all the bidders including other details are disclosed to all the bidders; that in fact in one of the writ petitions aforesaid in other High Courts challenging the tender such information had already been brought in public domain. The counsel for the respondent during the hearing has also relied on the judgment dated 02.07.2009 of the High Court of Punjab & Haryana in W.P. (C) No.9474/2009 titled Nokia Siemens Networks Pvt. Ltd. Vs. Union of India and on Canara Bank Vs. The Central Information Commission MANU/KE/0357/2007 : AIR 2007 Ker 225. He has also drawn attention to the proviso after Section 8(1)(j) of the Act laying down that the information which cannot be denied to the Parliament or State Legislature shall not be denied to any person. It is contended that the information aforesaid cannot be denied to the Parliament and hence the exemptions provided in Section 8(1) of the Act would not be attracted.

9. We, at the outset, deem it appropriate to discuss the issue generally as the same is likely to arise repeatedly. Confidentiality or secrecy is the essence of sealed bids. The same helps the contract awarding party to have the most competitive and best rates / offer. The essential purpose of sealed bidding is that the bids are secret bids that are intended by the vendor and expected by bidders to be kept confidential as between rival bidders until such time as it is too late for a bidder to alter his bid. Sealed bidding means and must be understood by all those taking part in it to mean that each bidder must bid without actually knowing what any rival has bid. The reason for this, as every bidder must appreciate, is that the vendor wants to avoid the bidders bidding (as they would do in open bidding such as at an auction) by reference to other bids received and seeking merely to top those bids by the smallest increment possible. The vendor's object is to get the bidders to bid "blind" in the hope that then they will bid more than they would if they knew how far other bidders had gone. Additionally, from each bidder's point of view his own bid is confidential and not to be disclosed to any other bidder, and he makes his bid in the expectation, encouraged by the invitation to submit a sealed bid, that his bid will not be disclosed to a rival. If, therefore, a rival has disclosed to him by the vendor the amount of another's bid and uses that confidential information to pitch his own bid enough to outbid the other, this is totally inconsistent with the basis on which each bidder has been invited to bid, and the rival's bid is not a good bid; likewise if the rival adopts a formula that necessarily means that he is making use of what should be confidential information (viz. the bid of another) in composing his own bid. In such a case, the amount of the other's bid is being constructively divulged to him. The process of inviting tenders has an element of secrecy - since nobody knows what would be the bid of the competitor, every one will try to show

preparedness for the best of the terms which will be acceptable to the institution calling the tenders. This requires ensuring that the tenders are not tampered with, the offers are not leaked to another bidder or even to the officers of the institution for which the tenders are called. Secret bids thus promote competition, guard against favouritism, improvidence, extravagance, fraud and corruption and lead to award of contract, to secure the best work at the lowest price practicable.

10. Over the years the secret bids are not confined to the price only, which may cease to be of any value or lose confidentiality once the bids are opened. The bids/tenders today require the bidders to submit in the bids a host of information which may help and be required by the tender calling institution to evaluate the suitability and reliability of the contracting party. The bidders are often required to, in their bids disclose information about themselves, their processes, turnover and other factors which may help the tender calling institution to evaluate the capability of the bidder to perform the contracted work. The secret bids/tenders are often divided into technical and financial parts. The bidders in the technical part may reveal to the tender calling institution their technology and processes evolved and developed by them and which technology and processes may not otherwise be in public domain and which the bidder may not want revealed to the competitors and which technology/processes the bidder may be using works for the other clients also and which technology/processes if revealed to the competitors may lead to the bidder losing the competitive edge in subsequent awards of contracts. If it were to be held that a bidder by virtue of participating in the tender becomes entitled to all particulars in the bids of all the bidders, the possibility of unscrupulous businessmen participating in the tender merely for acquiring such information, cannot be ruled out. Such disclosure may lead to the competitors

undercutting in future bids. We may at this stage notice that the Freedom of Information Act prevalent in United States of America as well as the Freedom of Information Act, 2000 in force in United Kingdom, both carve out an exception qua trade secrets and commercial or financial information obtained from a person and which is privileged or confidential. The tests laid down in those jurisdictions also, is of 'if disclosure of information is likely to impair government's ability to obtain necessary information in future or to cause substantial harm to competitive position of person from whom information is obtained'. It has been held that unless persons having necessary information are assured that it will remain confidential, they may decline to cooperate with officials and the ability of government to make intelligent well-informed decisions will be impaired. Yet another test of whether the information submitted with the bids is confidential or not is of 'whether such information is generally available for public perusal' and of whether such information "is customarily made available to the public by the business submitter'. If it is not so customarily made available, it is treated as confidential.

11. Though the report of the appellant of evaluation of tenders, is a document of the appellant but the evaluation therein is of the tenders of the various bidders and the report of evaluation may contain data and other particulars from the bids and which data/particulars were intended to be confidential. If any part of the bids is exempt from disclosure, the same cannot be supplied obliquely through the disclosure of evaluation report.

12. What thus emerges is that a balance has to be struck between the principle of promoting honest and open government by ensuring public access to information created by the government on the one hand and the principle of confidentiality breach whereof is likely to cause substantial harm to competitive position of the person from whom information is obtained and the disclosure impairing the

government's ability to obtain necessary information in future on the other hand. Also, what has been discussed above may not apply in a proceeding challenge wherein is to the evaluation process. It will then be up to the Court before which such challenge is made, to decide as to what part of the evaluation process is to be disclosed to the challengers.

13. Questions also arise as to the information contained in the bids / tenders of the unsuccessful tenderers. Often it is found that the same is sought, to know the method of working and to adversely use the said information in future contracts. Generally there can be no other reason for seeking such information.

14. Once we hold that the information of which disclosure is sought relates to or contains information supplied by a third party and which the third party may claim confidential, the third party information procedure laid down in Section 11 of the Act is attracted. The said aspect has not been considered either by the CIC or by the learned Single Judge.

15. What we find in the present case is that the tender process has been scrapped. The information which is being sought relates to the evaluation of the bids by the appellant. Though the Non Disclosure Agreement extended the obligation of confidentiality beyond the date of opening of the tenders also but only for a period of two years from the date of disclosure or to the completion of business purpose whichever is later. The business purpose stands abandoned with the scrapping of the tenders. More than two years have elapsed from the date when the information was submitted. Thus the said agreement now does not come in the way of the appellant disclosing the information. However, we are of the opinion that disclosure of such information which would be part of the evaluation process would still require the third party information procedure under Section 11 of the Act to be followed. As

aforesaid, besides the bid price, there may still be information in the bid and which may have been discussed in the evaluation process, of commercial confidence and containing trade secret or intellectual property of the bidders whose bids were evaluated.

16. Though in the light of the view taken by us hereinabove, the question of validity of the agreement need not to be adjudicated but since we have heard the counsels, we deem it our duty to adjudicate upon the said aspect also. Section 22 of the Act relied on by the learned Single Judge though giving overriding effect to the provisions of the Act still saves the instruments “having effect by virtue of any law other than this Act”. This Court in *Vijay Prakash v. Union of India* MANU/DE/0890/2009 : AIR 2010 Delhi 7 has held that though Section 22 the Act overrides other laws, the opening non-obstante clause in Section 8 confers primacy to the exemptions enacted under Section 8(1). Thus, once the information is found to be exempt under Section 8(1), reliance on Section 22 is misconceived. Whether the

information is of such nature as defined in Section 8(1)(d) of the Act, can be adjudicated only by recourse to Section 11 of the Act.

17. We however do not deem it necessary to adjudicate on the proviso after Section 8(1)(j) of the Act and leave the same to be adjudicated in an appropriate proceedings. We may however notice that a Division Bench of the Bombay High Court in *Surupsingh Hrya Naik Vs. State of Maharashtra* MANU/MH/0170/2007 : AIR 2007 Bom 121 has held that the proviso has been placed after Section 8(1)(j) and would have to be so interpreted in that context and the proviso applies only to Section 8(1)(j) and not to other sub-sections.

18. The appeal is therefore partly allowed. The matter is remanded back to the CIC. If the respondent is still desirous of the information sought, the CIC shall issue notice to the parties whose bids are evaluated in the evaluation process information qua which is sought by the respondent and decide the request of the respondent after following the procedure under Section 11 of the Act. No order as to costs.

IN THE HIGH COURT OF DELHI

LPA 764/2011

Decided On: 09.01.2012

Appellants: **Ankur Mutreja**

Vs.

Respondent: **Delhi University**

Hon'ble Judges:

Hon'ble The Acting Chief Justice and Hon'ble Mr. Justice Rajiv Sahai Endlaw.

Subject: Right to Information

JUDGMENT

A.K. Sikri, Acting Chief Justice

1. The appellant had sought certain information under the provisions of the Right to Information Act, 2005 from the Information Officer of the respondent University; being not satisfied with the reply received, the appellant filed the first appeal and ultimately the second appeal to the Central Information Commission (CIC). The CIC vide its order dated 15.01.2011 directed the Information Officer of the respondent University to provide the required information to the appellant and also issued notice to the Information Officer of the respondent University to show cause as to why penalty be not imposed on him for providing false information ostensibly with mala fide intention. The appeal filed by the appellant was however disposed of.

2. The information directed has since been supplied to the appellant and the appellant has no grievance in that regard. The appellant however filed the writ petition, from dismissal whereof this appeal has arisen, averring that the CIC ought not to have disposed of the appeal vide order dated 15.01.2011 since notice

to show cause as aforesaid had been issued to the Information Officer of the respondent University. It was / is the contention of the appellant that owing to the appeal having been disposed of, the appellant had no opportunity to be heard on the issue of imposition of penalty on the Information Officer of the respondent University. The appellant, in the writ petition, sought the relief of quashing of the order dated 15.01.2011 of the CIC in so far as disposing of the appeal and sought a direction to CIC to grant an opportunity to the appellant to file a rejoinder to the reply filed by the respondent University to the show cause notice aforesaid and to hear the appellant on the issue of imposition of penalty.

3. The learned Single Judge dismissed the writ petition holding that imposition of penalty under Section 20 of the RTI Act is a matter of discretion of the CIC and there was nothing to indicate that the penalty if ultimately imposed would have become payable to the appellant, as contended by the appellant.

4. Notice of this appeal was issued. We have heard the appellant appearing in person and the counsel for the respondent. We have also perused written arguments filed by the appellant.

5. It is the contention of the appellant, that a combined reading of Section 19(8)(c) and Section 20 of the Act makes it abundantly clear that the proceedings under Section 20 of the

Act are part of the appellate proceedings; that the complainant on whose instance notice to show cause against imposition of penalty is issued has a role as a prosecutor in the penalty proceedings and penalty proceedings cannot be held in his absence - reliance in this regard is placed on Ram Chander Vs. State of Haryana MANU/SC/0206/1981 : AIR 1981 SC 1036; that CIC at different times has been following different procedure - in some matters the appeal is not disposed of till the conclusion of the penalty proceedings, thereby giving opportunity to the complainant to participate in the penalty proceedings. He thus contends that the procedure for the penalty proceedings needs to be laid down.

6. We have at the outset enquired from the appellant the fate of the notice to show cause issued to the Information Officer of the respondent University. The appellant states that since he had no opportunity to participate, he does not know the outcome thereof. The counsel for the respondent University states that the CIC was satisfied with the explanation furnished by the respondent University and thus dropped the show cause notice.

7. Section 19(8)(c) and Section 20 of the RTI Act are as under:

19. Appeal.

(1).....

(2).....

(3).....

(4).....

(5).....

(6).....

(7).....

(8) In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to, -

(a).....

(b).....

(c) impose any of the penalties provided under this Act.

20. Penalties.-(1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

(2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information

within the time specified under sub-section (1) of Section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

8. It is clear from the language of Section 20(1) that only the opinion, whether the Information Officer has “without any reasonable cause” refused to receive the application for information or not furnished information within the prescribed time or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information etc., has to be formed “at the time of deciding the appeal”. The proviso to Section 20(1) of the Act further requires the CIC to, after forming such opinion and before imposing any penalty, hear the Information Officer against whom penalty is proposed. Such hearing obviously has to be after the decision of the appeal. The reliance by the appellant on Section 19(8)(c) of the RTI Act is misconceived. The same only specifies the matters which the CIC is required to decide. The same cannot be read as a mandate to the CIC to pass the order of imposition of the penalty along with the decision of the appeal. Significantly, Section 19(10) of the Act requires CIC to decide the appeal “in accordance with such procedure as may be prescribed”. The said procedure is prescribed in Section 20 of the Act, which requires the CIC to, at the time of deciding the appeal only form an opinion and not to impose the penalty.

9. The aforesaid procedure is even otherwise in consonance with logic and settled legal procedures. At the stage of allowing the appeal the CIC can only form an opinion as to the intentional violation if any by the Information

Officer of the provisions of the Act. Significantly, imposition of penalty does not follow every violation of the Act but only such violations as are without reasonable cause, intentional and malafide.

10. While in deciding the appeal, the CIC is concerned with the merits of the claim to information, in penalty proceedings the CIC is concerned with the compliance by the Information Officers of the provisions of the Act. A discretion has been vested in this regard with the CIC. The Act does not provide for the CIC to hear the complainant or the appellant in the penalty proceedings, though there is no bar also thereagainst if the CIC so desires. However, the complainant cannot as a matter of right claim audience in the penalty proceedings which are between the CIC and the erring Information Officer. There is no provision in the Act for payment of penalty or any part thereof if imposed, to the complainant. Regulation 21 of the Central Information Commission (Management) Regulations, 2007 though provides for the CIC awarding such costs or compensation as it may deem fit but does not provide for such compensation to be paid out of the penalty if any imposed. The appellant cannot thus urge that it has a right to participate in the penalty proceedings for the said reason either.

11. The penalty proceedings are akin to contempt proceedings, the settled position with respect thereto is that after bringing the facts to the notice of the Court, it becomes a matter between the Court and the contemnor and the informant or the relator who has brought the factum of contempt having been committed to the notice of the Court does not become a complainant or petitioner in the contempt proceedings. His duty ends with the facts being placed before the Court though the Court may in appropriate cases seek his assistance. Reference in this regard may be made to *Om Prakash Jaiswal v. D.K. Mittal*

MANU/SC/0118/2000 : (2000) 3 SCC 171, Muthu Karuppan, Commr. of Police, Chennai v. Parithi Ilamvazhuthi MANU/SC/0418/2011 : (2011) 5 SCC 496 and Division Bench judgment of this Court in Madan Mohan Sethi v. Nirmal Sham Kumari MANU/DE/0423/2011. The said principle applies equally to proceedings under Order XXXIX, Rule 2A of the Civil Procedure Code, 1908 which proceedings are also penal in nature.

12. Notice may also be taken of Section 18 of the RTI Act which provides for the CIC to receive and inquire into complaints against

the Information Officer. The legislature having made a special provision for addressing the complaints of aggrieved information seekers is indicative of the remedy of such aggrieved information seekers being not in the penalty proceedings under Section 20.

13. We therefore do not find any error in the procedure adopted by the CIC. Moreover, the appellant did not approach the CIC in this regard and preferred to file this petition directly.

14. We therefore do not find any merit in this appeal and the same is accordingly dismissed.

IN THE HIGH COURT OF DELHI

W.P. (C) 1243/2011 & C.M. No. 2618/2011 (for stay)

Decided On: 13.07.2012

Appellants: **UPSC**

Vs.

Respondent: **R.K. Jain**

Hon'ble Judges:

Hon'ble Mr. Justice Vipin Sanghi

Subject: Right to Information

JUDGMENT

Vipin Sanghi, J.

1. The present writ petition is directed against the decision of the Central Information Commission (hereinafter referred to as the "CIC") dated 12.01.2011 passed in Appeal No. CIC/WB/A/2009/001004- SM, preferred under Section 19 of the Right to Information Act, 2005, (hereinafter referred to as the "Act") whereby the petitioner has been directed to provide the relevant records in its possession as sought by the Respondent herein. The respondent by an application filed under Section 6 of the Act, sought the following Information from the petitioner:

A. Please provide inspection of the records, documents, note sheets, manuscripts, records, reports, office memorandum, part files and files relating to the proposed disciplinary action and/or imposition of penalty against Shri G.S. Narang, IRS, Central Excise and customs Officer of 1974 Batch and also inspection of records, files, etc., relating to the decision of the UPSC thereof. Shri G.S. Narang is presently posted as Director General of Inspection Customs and Central Excise.

B. Please provide copies of all the note sheets and the final decision taken regarding imposition of penalty/ disciplinary action and decision of the UPSC thereof.

2. The Central Public Information Officer (CPIO) of the petitioner, however, declined to provide the same on the ground that the information sought pertained to the disciplinary case of Shri G. S. Narang, which was of personal nature, disclosure of which has no relationship to any public activity or interest. It further stated that the disclosure of the same may infringe upon the privacy of the individual and that it may not be in the larger interest. The petitioner, therefore, claimed exemption from disclosing the information under Section 8(1)(j) of the Act.

3. The Respondent, consequently, filed an appeal under Section 19 of the Act, before the 1st Appellate Authority of the Petitioner. The Appellate Authority dismissed the Appeal on the same ground that the information sought was exempted from disclosure under Section 8(1)(j) of the Act.

4. Being aggrieved by the said decision, the Respondent preferred an appeal before the CIC. Setting aside the decision of the "First Appellate Authority", the CIC held as follows:

4. *After carefully considering the facts of the case and the submissions made by both parties, we are of the view that the CPIO was not right in denying this information. As far as the UPSC*

is concerned, the Respondent informed, it receives references from the Ministries and Departments in disciplinary matters to give its comments and recommendations on individual cases. In this case too, the UPSC had been consulted and that it had offered its comments and views to the Government. Whatever records it holds in regard to this case will have to be disclosed because this cannot be classified as personal information merely on the ground that it concerns some particular officer. Our attention was drawn to a Division Bench ruling by the High Court of Kerala in the WA No. 2781/2009 in which the Court had held that the information sought by an employee, from his employer, in respect of domestic enquiry and confidential reports of his colleagues would not amount to personal information as provided under Section 8(1)(j) of the Right to Information (RTI) Act. In other words, information regarding the disciplinary matters against any employee cannot be withheld by claiming it to be personal Information.

5. In the light of the above, we direct the CPIO to invite the Appellant on any mutually convenient date within 15 working days from the receipt of this order and to show him the relevant records in the possession of the UPSC for his inspection. After Inspection, if the Appellant chooses to get the photocopies of some of those records, the CPIO shall provide the same free of cost.

(Emphasis supplied)

Petitioner's Submissions

5. The Petitioner assails the decision of the CIC, in the present writ petition, on several grounds. The Petitioner submits that the information sought by the Respondent at point "A" of his RTI application is not with the Petitioner. It is stated by the Petitioner that the said information relates to the actions of the concerned Ministry/ Department and as such no record thereof is available or held with the Petitioner. As regards rest of the Information

sought by the Respondent, it is submitted that the same is exempt from disclosure under Section 8(1)(e), 8(1)(g) and 8(1)(j) of the Act. The relevant extract of Section 8 of the Act reads as follows:

Section 8 - Exemption from disclosure of information

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,--

x x x

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

x x x

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

x x x

(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person;

x x x

6. The Petitioner claims exemption under Section 8 (1)(j) of the Act on the basis that the disclosure of the information sought would cause unwarranted invasion of the privacy of

the concerned charged officer. The Petitioner also submits that disclosure would not serve any larger public interest and would rather expose and make public- vulnerable and sensitive information relating to third party(s). The petitioner submits that the CIC erred in relying upon the decision of the Kerala High Court in WA No. 2781/2009 titled Centre for Earth Science Studies vs. Dr. Mrs. Anson Sebastian & the State Information Commission.

7. It is submitted by the Petitioner that the information sought for by the Respondent includes not only information that is personal to a third party i.e. the charged officer, but also contains information relating to the particular views and opinions of persons/ officers who contributed to the disciplinary proceedings against the charged officer. This opinion was given in trust and confidence and as such is held by the Petitioner in its fiduciary capacity, and is thereby exempt under Section 8(1)(e) of the Act. It is submitted that file notings pertaining to disciplinary cases are exempt from disclosure under the aforesaid section. To further his submission, the petitioner has placed reliance upon the judgment of this Court in W.P. (C) No. 12367/2009 and LPA No. 418/2010 titled Ravinder Kumar vs. Central Information Commission & Ors., the judgment of the Supreme Court in Institute of Chartered Accountants of India vs. Shaunak H. Satya and others, MANU/SC/1006/2011 : (2011) 8 SCC 781, and; the decision of the CIC in Shri K.L. Balbani vs. Directorate General of Vigilance, Customs & Central Excise dt. 16.09.2009.

8. Further, it is submitted that the disclosure of such information besides endangering the life and safety of the persons concerned, will also disclose the assistance that was given by the officers during the Disciplinary proceeding for enforcement of law. Consequently, it is argued, that the disclosure of the information sought would be exempt under Section 8(1)(g) of the Act.

9. The Petitioner contends that order of the CIC is unsustainable in law in as much, as, it is contrary to the decisions of the concurrent Benches of the CIC. Moreover, it has rendered its decision while this Court is seized of a similar issue in W.P. (C) No. 13205/2009 titled UPSC vs. C.L. Sharma.

Respondent's Submissions

10. The Respondent, on the other hand, has at the outset submitted that the CIC has merely directed the disclosure of the records in possession of the UPSC. It has not directed the Petitioner to procure records from the concerned Ministries or Departments and then to make them available to the Respondent for inspection.

11. The Respondent submits that the information directed to be disclosed to the Respondent, by the Impugned order, is not exempted under Section 8 (1)(e), 8(1)(g), or 8(1)(j) of the Act. It is further submitted that the CPIO and the first Appellate Authority had merely claimed exemption under Section 8(1)(j) of the Act, and that the Petitioner cannot, at this stage, be permitted to introduce new grounds by claiming exemption under Section 8(1)(g) and 8(1)(e) of the Act. It is also contented that there is no fiduciary relationship involved in the present case and the disclosure of information would not endanger the life and safety of anyone. Hence, the information sought is not exempt under Section 8(1)(e) and 8(1)(g) of the Act. It is also submitted that the exemption under Section 8(1)(e) and (j) is not available as it would be in the larger public interest to disclose the same.

12. As regards the exemption under Section 8(1)(j), it is submitted by the Respondent that disclosure of the information permitted by the impugned order relates to the public activity of public servants. It can, by no stretch of imagination, be treated as personal information of a Public Servant. The information sought is not personal information relating to

a third party, but is contained in the records of the UPSC itself. It is further submitted that the disclosure of the information sought is in the larger public interest, since the case not only relates to serious irregularities committed in the administration of taxation cases and adjudication of offence, but also involves different opinions given by two public authorities, i.e. the Central Vigilance Commission and the Petitioner on the basis of the same records, thereby making it necessary to see whether same or different records were produced or any part of the records were withheld from or by the Petitioner, and also whether a proper method and procedure was adopted by the Petitioner. It is contented that the disclosure would promote transparency and accountability, thereby adding to the credibility to the Petitioner itself.

13. The Respondent submits that the judgment of this Court in Ravinder Kumar (Supra), relied upon by the petitioner, have no applicability to the present case and that the CIC has rightly followed the judgment of the Kerala High Court in Centre for Earth Science Studies (Supra). It is also submitted that the mere pendency of some similar matter before this Court would not preclude the CIC to decide the appeal pending before it.

Discussion

14. The principal contention of the Petitioner, right from the stage when the RTI application was considered by the CPIO up till the stage of consideration of the Second Appeal before the CIC, was that the information sought for by the Respondent is exempted from disclosure under Section 8(1)(j) of the Act. Therefore, I proceed to deal with it first.

15. The exemption under Section 8(1)(j) is available in respect of "personal information" of an individual. For the exemption to come into operation, the personal information sought:

(i) Should not have relation to any public activity, or to public interest OR,

(ii) Should be such as to cause unwarranted invasion of the privacy of the individual. However, the exemption is not available in a case where larger public interest justifies such disclosure.

16. The word "personal" means appertaining to the person; belonging to an individual; limited to the person; having the nature or partaking of the qualities of human beings, or of movable property. [See Black's Law Dictionary, Sixth Edition].

17. The word "information" is defined in Section 2(f) of the Act as meaning:

any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

18. Therefore, "personal information" under the Act, would be information, as set forth above, that pertains to a person. As such it takes into its fold possibly every kind of information relating to the person. Now, such personal information of the person may, or may not, have relation to any public activity, or to public interest. At the same time, such personal information may, or may not, be private to the person.

19. The term "personal information" under section 8(1)(j) does not mean information relating to the information seeker, or the public authority, but about a third party. The section exempts from disclosure personal information, including that which would cause "unwarranted invasion of the privacy of the individual". If one were to seek information about himself, the question of invasion of his own privacy would not arise. It would only arise where the information sought relates to a third party. Consequently, the exemption under Section 8(1)(j) is as regards third party personal information only.

20. Further, the personal information cannot be that of a “public authority”. No public authority can claim that any information held by it is personal to it. There is nothing “personal” about any information held by a public authority in relation to itself. The expression “personal information” used in Section 8(1)(j) means information personal to any “person”, that the public authority may hold. For instance, a public authority may in connection with its functioning require any other person to provide information which may be personal to that person. It is that information, pertaining to that other person, which the public authority may refuse to disclose, if the information sought satisfies the conditions set out in clause (j) of Section 8(1) of the Act, i.e., if such information has no relationship to any public activity (of the person who has provided the information, or who is the source of the information, or to whom that information pertains), or to public interest, or which would cause unwarranted invasion of the privacy of the individual (unless larger public interest justifies disclosure). The use of the words “invasion of the privacy of the individual”, instead of “an individual”, shows that the legislative intent was to connect the expression “personal information” with the word “individual”.

21. Merely because information that may be personal to a third party is held by a public authority, a querist does not become entitled to access it, unless the said personal information has a relationship to a public activity of the third person (to whom it relates), or to public interest. If it is private information (i.e. it is personal information which impinges on the privacy of the third party), its disclosure would not be made unless larger public interest dictates it. Therefore, for example, a querist cannot seek the personal or private particulars provided by a third party in his application made to the passport authorities in his application to obtain a passport, merely because such information is available with the passport authorities, which

is a public authority under the Act. The querist must make out a case (in his application under Section 6 of the Act) justifying the disclosure of the information sought on the touchstone of clause (j) of Section 8(1) of the Act.

22. Proceeding further, I now examine the expressions “Public activity”, “Public interest” and “Privacy of the individual” used in Section 8(1)(j) of the Act.

23. “Public activity” qua a person are those activities which are performed by the person in discharge of a public duty, i.e. in the public domain. There is an inherent public interest involved in the discharge of such activities, as all public duties are expected to be discharged in public interest. Consequently, information of a person which is related to, or has a bearing on his public activities, is not exempt from disclosure under the scheme and provisions of the Act, whose primary object is to ensure an informed citizenry and transparency of information and also to contain corruption. For example, take the case of a surgeon employed in a Government Hospital who performs surgeries on his patients who are coming to the government hospital. His personal information, relating to discharge of his public duty, i.e. his public activity, is not exempt from disclosure under the Act. Such information could include information relating to his physical and mental health, his qualifications etc., as the said information has a bearing on the discharge of his public duty, but would not include his other personal information such as, his taste in music, sport, art, his family, his family background etc., which has no bearing/ relation to his act of performing his duties as a surgeon.

24. “Public interest” is also a ground for taking away the exemption from disclosure of personal information. Therefore, a querist may seek personal information of a person from a public authority in public interest. The second half of the first part of clause (j) of Section

8(1) shows that when personal information in respect of a person is sought, the authority concerned shall weigh the competing claims i.e., the claim for the protection of personal information of the concerned person on the one hand, and the claim of public interest on the other, and if “public interest” justifies disclosure, i.e., the public interest outweighs the need for protection of personal information, the concerned authority shall disclose the information.

25. For example, a querist may seek from the income tax authorities- the details of the income tax returns filed by private individual/ juristic entity - if the querist can justify the disclosure of such personal information on the anvil of public interest. The authorities would, in such cases, be cautious to ensure that the ground of “public interest” is not routinely used as a garb by busy bodies to pry on the personal affairs of individual private citizens/entities, as it would be against public interest (and not in public interest) to permit such personal information of third parties to fall into the hands of anybody or everybody.

26. At this stage, I may digress a little and observe that whenever the querist applicant wishes to seek information, the disclosure of which can be made only upon existence of certain special circumstances, for example- the existence of public interest, the querist should in the application (moved under Section 6 of the Act) disclose/ plead the special circumstance, so that the PIO concerned can apply his mind to it, and, in case he decides to issue notice to the concerned third party under Section 11 of the Act, the third party is able to effectively deal with the same. Only then the PIO/appellate authority/CIC would be able to come to an informed decision whether, or not, the special circumstances exist in a given case.

27. I may also observe that public interest does not mean that which is interesting as gratifying curiosity or love of information or amusement; but that in which a class of the

community have a pecuniary interest, or some interest by which their rights or liabilities are affected. The expression “public interest” is not capable of a precise definition and has not a rigid meaning and is elastic and takes its colors from the statute in which it occurs, the concept varying with the time and the state of the society and its needs. [See Advanced Law Lexicon, Third Edition].

28. The second part of clause (j) of Section 8(1) appears to deal with the scope of defence founded on the right of privacy of an individual. The tussle between the right of privacy of an individual and the right of others to seek information which may impinge on the said right of privacy, is what the said clause seeks to address.

29. The right to privacy means the right to be left alone and the right of a person to be free from unwarranted publicity. Black’s Law Dictionary says that the terms “right to privacy” is a generic term encompassing various rights recognized to be inherent in concept of ordered liberty, and such rights prevent government interference in intimate personal relationship’s or activities, freedoms of individual to make fundamental choices involving himself, his family, and his relationship with others. A man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written for the benefit of others, or his eccentricities commented upon by any means or mode. It is based on the theory that everyone has the right of inviolability of the person.

30. The “right to privacy”, even though by itself has not been defined by our Constitution and though, as a concept, it may be too broad to define judicially, the Supreme Court has recognised by its liberal interpretation that “right to privacy” is an integral part of the right to personal liberty under Article 21 of the Constitution of India.

31. In *Rajagopal vs. State of Tamil Nadu*, MANU/SC/0056/1995 : AIR 1995 SC 264, the Supreme Court had the occasion to comment on the origin, basis, nature and scope of the right to privacy in India. Mr. Justice B.P. Jeevan Reddy, referred to the earlier decision of the Supreme Court in *Kharak Singh and Ors. v. State of Uttar Pradesh and Ors.*, MANU/SC/0085/1962 : 1964 (1) SCR 332 : AIR 1963 SC 129 and the decision in *Gobind v. State of Madhya Pradesh*, MANU/SC/0119/1975 : 1975 (2) SCC 148: AIR 1975 SC 1378. In the later case, Mathew, J., speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in *Griswold v. Connecticut*, [1965] 385 U.S. 479 : 14 L.Ed. 2d. 510 and *Roe v. Wade*, [1973] 410 U.S. 113. After referring to *Kharak Singh* (supra) and the said American decisions, the learned Judge stated the law in the following words:

...privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test....

...privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of

privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty....

There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures. [See 26 Stanford Law Rev. 1161, 1187].

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

The European Convention on Human Rights, which came into force on September 3, 1953, represents a valiant attempt to tackle the new problem. Article 8 of the Convention is worth citing [See "Privacy and Human Rights", Ed. AH Robertson, p. 176]:

1. *Every one has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public*

safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

(Emphasis supplied)

32. Mr. Justice B.P. Jeevan Reddy, summarized the concept of right to privacy as under:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interest of decency [Article 19 (2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the Rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter,

the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. **It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above.** It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and the Parliament and Legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(Emphasis supplied)

33. It follows that the "privacy" of a person, or in other words his "private information", encompasses the personal intimacies of the home, the family, marriage, motherhood, procreation, child rearing and of the like nature. "Personal information", on the other hand, as aforesaid, would be information, in any form, that pertains to an individual. Therefore, "private information" is a part of "personal information". All that is private is personal, but all that is personal may not be private. A person has a right to keep his private information, or in other words, his privacy guarded from disclosure. It is this right which has come to be recognised as fundamental to a person's life and liberty, and is accordingly protected from unwarranted/unauthorised invasion under the

Act, and can be overridden only in “larger” public interest.

34. The use of the expression “unwarranted” before “invasion of the privacy of the individual” and the expression “larger” before “public interest” needs attention. The use of “unwarranted”, as aforesaid, shows that the PIO, Appellate Authority or the CIC, as the case may be, should come to a definite finding upon application of mind to all the relevant considerations and submissions of the querist and the third party - whose privacy is at stake, that the disclosure of the information, which would cause invasion of the privacy of the individual is warranted, in the facts of the case. He should, therefore, come to the conclusion that even after application of the principle of severability (contained in Section 10 of the Act), it is necessary to disclose the personal and private information in larger public interest. The expression “larger public interest” connotes that the public interest that is sought to be addressed by the disclosure of the private information, serves a large section of the public, and not just a small section thereof. Therefore, if the information has a bearing on the state of the economy; the moral values in the society; the environment; national safety, or the like, the same would qualify as “larger public interest”.

35. Take for instance, a case where a person is employed to work in an orphanage or a children’s home having small children as inmates. The employer may or may not be a public authority under the Act. That person, i.e. the employee, has a background of child abuse, for which he has undergone psychiatric treatment in a government hospital. A querist could seek information regarding the medical and psychiatric treatment undergone by the person concerned from the government hospital where the person has undergone treatment, in larger public interest, even though the said information is not only personal, but private, vis-à-vis. the employee. The larger public

interest in such a case would lay in protecting the children living in the orphanage/ children’s home from possible child abuse.

36. In light of the above discussion, the following principles emerge for the exemption under Section 8(1)(j) to apply:

- (i) The information sought must relate to “Personal information” as understood above of a third party. Therefore, if the information sought does not qualify as personal information, the exemption would not apply;
- (ii) Such personal information should relate to a third person, i.e., a person other than the information seeker or the public authority; AND
- (iii) (a) The information sought should not have a relation to any public activity of such third person, or to public interest. If the information sought relates to public activity of the third party, i.e. to his activities falling within the public domain, the exemption would not apply. Similarly, if the disclosure of the personal information is found justified in public interest, the exemption would be lifted, otherwise not;

OR

- (iii) (b) The disclosure of the information would cause unwarranted invasion of the privacy of the individual, and that there is no larger public interest involved in such disclosure.

37. Let us now examine the claim of exemption under Section 8(1)(j) in the present case, in view of the aforesaid principles. The information sought by the Respondent relates to the proposed disciplinary action and/or imposition of penalty against Shri G.S. Narang, IRS, Central Excise and Customs Officer of 1974 Batch and the decision/recommendation of the Petitioner communicated to the concerned Ministry.

38. The Petitioner in the present case, being a constitutional body and thereby a “public

authority” under the Act, cannot claim the exemption of personal information qua itself and its officials under Section 8(1)(j). Even otherwise, its act of tendering advice to the concerned Ministry on matters relating to disciplinary proceedings against a charged officer is in discharge of a public duty entrusted to it by the law itself, and is thereby a public activity. Consequently, the defence is also not available to the officers of the Petitioner with respect to their acts and conduct relevant to the discharge of their official duties.

39. The information sought, in the present case, also does not relate to the privacy of the charged officer. Disciplinary inquiry of the charged officer is with regard to the alleged irregularities committed by him while discharging public duties and public functions. The disclosure of such information cannot be regarded as invasion of his privacy.

40. Even otherwise, the disclosure of such information would be in the larger public interest, keeping in view the object of the Act, which is to promote transparency and accountability and also to contain corruption. The preamble of the Act, inter alia, states:

An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority,....

And Whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And Whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And Whereas it is necessary to harmonise these conflicting interest while preserving the paramountcy of the democratic ideal;

41. This Court in LPA No. 501/2009 titled Secretary General, Supreme Court of India vs. Subhash Chandra Aggarwal, dealing with the concept of “Right to Information” under the Act observed as under:

30. *Information is currency that every citizen requires to participate in the life and governance of the society. In any democratic polity, greater the access, greater will be the responsiveness, and greater the restrictions, greater the feeling of powerlessness and alienation. Information is basis for knowledge, which provokes thought, and without thinking process, there is no expression. “Knowledge” said James Madison, “will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it is but a prologue to farce or tragedy or perhaps both”. “The citizens” right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.*

(Emphasis supplied)

42. The Court, while explaining the importance and need of the Right, referred to the following observation of the Supreme Court in S.P. Gupta vs. Union of India, MANU/SC/0080/1981 : 1981 (Supp) SCC 87:

65. *The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the*

government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means *inter alia* that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government - an attitude and habit of mind. **But this important role people can fulfill in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government.**

(Emphasis supplied)

43. After, having referred to a sea of judgments and scholarly excerpts, the Division Bench of this Court held as follows:

60. *The decisions cited by the learned Attorney General on the meaning of the words "held" or "control" are relating to property and cannot be relied upon in interpretation of the provisions of the Right to Information Act. The source of right to information does not emanate from the Right to Information Act. It is a right that emerges from the constitutional guarantees under Article 19(1)(a) as held by the Supreme Court in a catena of decisions. The Right to Information Act is not repository of the right to information. Its repository is the constitutional rights guaranteed under Article 19(1)(a). The Act is merely an instrument that lays down statutory procedure in the exercise of this right. Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed. In construing such a statute the Court ought to give to it the widest operation which its language will permit. The Court will also not readily read words which are not there and introduction of which will*

restrict the rights of citizens for whose benefit the statute is intended.

(Emphasis supplied)

44. It is clear from the above, that the thrust of the legislation is to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority, unless its disclosure is exempted under the Act. The access to information is considered vital to the functioning of a democracy, as it creates an informed citizenry. Transparency of information is considered vital to contain corruption and to hold Government and its instrumentalities accountable to the governed citizens of this country.

45. The orders of the learned Single Judge and Division Bench of this Court in Ravinder Kumar (Supra) have no relevance for a variety of reasons. The order of the learned Single Judge, upholding the claim of exemption under Section 8(1)(j) raised by the public authority- to the disclosure of note sheets containing opinions and advices rendered by officials in respect of departmental proceedings- on the ground that the same was against public interest, had been made specifically in the facts and circumstances of that case. Further, the order of the Division Bench was an order dismissing an application for restoration of the LPA. It was not an order on merits. There was no decision on any legal proposition on merits rendered by the Court in the said order. Mere prima facie observations of the Division Bench do not constitute a binding precedent. The decisions in Ravinder Kumar (supra), therefore, do not even otherwise apply in the facts of the present case.

46. Reliance placed, by the Petitioner, on Shri K.L. Bablani (supra) is misplaced. Firstly, this is the view of the CIC and does not bind this Court. What can, however, be relied upon are the reasons contained in this decision to persuade this Court to form its view. The CIC

held that the file notings relating to vigilance matters, on the basis of which administrative/disciplinary action has been taken may not be disclosed, except upon demonstration of public interest, as it could embarrass and put pressure on those making file notings regarding the officer whose conduct is under comment.

47. The concerns expressed in, and which swayed the decision of the CIC in Shri K.L. Balbani (supra) relied upon by the Petitioner, can be met by resort to Section 10 of the Act. However, those concerns cannot be a good reason to altogether deny information which, otherwise, is not exempt from disclosure under the law. Consequently, the defence set up by the petitioner, founded upon clause (j) of Section 8(1) is not tenable in this case.

48. The defences under Section 8(1)(e) and Section 8(1) (g) of the Act would also be of no avail to the Petitioner in the present case. This is so, not merely on account of it being an afterthought of the Petitioner to raise the same, but also because they are untenable in the facts of the present case.

49. The over-riding public interest involved in the present case, as aforesaid, would render inoperative the exemption under Section 8(1) (e) of the Act. Even otherwise, the exemption under Section 8(1)(e) of the Act would not apply since the information sought by the Respondent is not held by, or available with the petitioner in its fiduciary capacity. The Supreme Court in CBSE vs. Aditya Bandopadhyay, MANU/SC/0932/2011 : (2011) 8 SCC 497, laid down the test of determining fiduciary relationship as follows;

41. *In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to students who participate in an examination, as a government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words ‘information available to a*

person in his fiduciary relationship’ are used in Section 8(1)(e) of RTI Act in its normal and well recognized sense, that is to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary - a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically/infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a share-holder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer-books, that come into the custody of the examining body.

(Emphasis supplied)

50. In the present case it cannot be said that the opinion /advice tendered by the officers of the petitioner in respect of Sh. G.S. Narang was on account of their position as that of a “beneficiary” and that the position of the petitioner was that of a “trustee”. The officers concerned who were involved in the opinion/advice making process acted in the discharge of their official/public duties. In any event, as aforesaid, the interest of such an officer can be effectively and sufficiently safeguarded by resort to Section 10 of the Act.

51. Reliance is placed by the petitioner, on the Judgment of the Supreme Court in Institute of Chartered Accountants of India vs. Shaunak H. Satya & Ors., MANU/SC/1006/2011 : (2011) 8 SCC 781. The Supreme Court, in the said

decision, while referring to the test laid down in the Aditya Bandopadhyay (supra), observed as under:

21. *The instructions and 'solutionstoquestions' issued to the examiners and moderators in connection with evaluation of answer scripts, as noticed above, is the intellectual property of ICAI. These are made available by ICAI to the examiners and moderators to enable them to evaluate the answer scripts correctly and effectively, in a proper manner, to achieve uniformity and consistency in evaluation, as a large number of evaluators and moderators are engaged by ICAI in connection with the evaluation. The instructions and solutions to questions are given by the ICAI to the examiners and moderators to be held in confidence. The examiners and moderators are required to maintain absolute secrecy and cannot disclose the answer scripts, the evaluation of answer scripts, the instructions of ICAI and the solutions to questions made available by ICAI, to anyone. The examiners and moderators are in the position of agents and ICAI is in the position of principal in regard to such information which ICAI gives to the examiners and moderators to achieve uniformity, consistency and exactness of evaluation of the answer scripts. **When anything is given and taken in trust or in confidence, requiring or expecting secrecy and confidentiality to be maintained in that behalf, it is held by the recipient in a fiduciary relationship.***

(Emphasis supplied)

52. The aforesaid observation of the Supreme Court in Institute of Chartered Accountants of India (Supra) does not render support to the contention of the Petitioner in claiming exemption from disclosing the opinion/recommendations tendered by it to the Ministry. It is not the case of the petitioner that the files notings containing the opinions/views of its officers, and the ultimate final opinion/recommendation tendered by it to the Ministry were confidential or secret.

53. It is pertinent to note that there is no bar, per se, to the furnishing of opinions and advices in response to an application under the Act. The Supreme Court in Khanapuram Gandaiah vs. Administrative Officer, MANU/SC/0018/2010 : (2010) 2 SCC 1, while referring to Section 2 (f) of the Act, which defines "information", held as under:

10. x x x

*This definition shows that an applicant under Section 6 of the RTI Act can get any information which is already in existence and accessible to the public authority under law. **Of course, under the RTI Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed, especially in matters pertaining to judicial decisions.***

(Emphasis supplied)

54. Therefore, what emerges from the aforesaid is that opinions/advices tendered/given by the officers (public officials) can be sought for under the Act, provided the same have not been tendered in confidence/secrecy and in trust to the authority concerned, i.e. to say- in a fiduciary relationship. Since the petitioner has not been able to set up the same in the present case, as aforesaid, the claim of exemption under Section 8(1)(e) stands rejected.

55. A bare perusal of Section 8(1)(g) of the Act, makes it clear that the exemption would come into operation only if the disclosure of information would endanger the life or physical safety of any person or would identify the source of the information or assistance given in confidence for law enforcement or security purposes. The opinion/advice, which constitutes the information in the present case, cannot be said to have been given "in confidence for law enforcement or security purposes", as aforesaid. Therefore, that part of the clause would be inapplicable and irrelevant

in the present case. So far as the petitioner's submission- that the disclosure of Information would endanger the life and safety of the officers who tendered their opinion/advice- is concerned, the same in my considered opinion, as aforesaid, in the facts of the present case, may be addressed- by resort to Section 10 of the Act. The exemption under Section 8(1) (g) of the Act, therefore, as claimed by the Petitioner, would be no ground for disallowing the disclosure of the information (sought by the Respondent) in the facts of the present case.

56. At this stage, I may take note of the fact that the petitioner herein tendered to this court, after the judgment in the present case had been reserved, decisions of the CIC- wherein information sought by RTI applicants with regard to disciplinary proceedings of charged officers, were held to be exempt from disclosure under Section 8(1)(h) of the Act on the grounds that the disciplinary proceedings/ investigation were ongoing, and as such, disclosure of information sought would impede the process of investigation.

57. The said argument cannot be availed of by the petitioner herein as it was not raised at any stage (before and after the filing of the present petition), and no opportunity was afforded to the respondent herein to meet the same. Moreover, on the facts of this case, the argument premised upon clause (h) of Section 8(1) cannot be sustained. The information sought at point "B" relates to the note sheets and final opinion rendered by the UPSC regarding imposition of penalty/punishment on the charged officer. Such information, as is evident from a plain reading, relates to findings and opinion post investigation i.e., after the investigation is complete. Disclosure

of such information cannot, by any means whatsoever be held to "impede the process of investigation" which could be raised only when an investigation is ongoing. As such the exemption under Section 8(1)(h) of the Act also cannot be raised by the petitioner in the present case.

58. The petitioner's submission that the order of the CIC is unsustainable in as much as it is contrary to the decisions of the concurrent benches of the CIC is neither here nor there. The impugned decision of the CIC had been made specifically in the facts and circumstances of the present case. As regards the Petitioner's submission that the CIC's decision (Impugned order) is unsustainable since it was rendered while this Court was seized of a similar issue in *UPSC v. C.L. Sharma* (supra)- is concerned, the same in my view is entirely untenable. The pendency of the same issue in other cases before this Court does not preclude the CIC from dealing with the issues arising before it, unless there is a restraint on the CIC from doing so. There is nothing on record to suggest that this Court has, in *UPSC v. C.L. Sharma* (supra), put a blanket restraint on the CIC from dealing with the claim of exemption under Section 8(1)(j) of the Act. Therefore, the said submission also stands rejected.

59. In view of above, the decision of the CIC is upheld, subject to the modification that the petitioner may, examine the case with regard to applicability of Section 10 of the Act, in relation to the names of the officers who may have acted in the process of opinion formation while dealing with the case of charged officer Sh. G.S. Narang. The petition is accordingly disposed of. The interim order stands vacated.

IN THE HIGH COURT OF DELHI

W.P. (C) No. 13090 of 2006

Decided On: 11.07.2012

Appellants: **Union of India**

Vs.

Respondent: **Central Information Commission & Anr.**

Hon'ble Judges:

Hon'ble Mr. Justice Anil Kumar

Subject: Right to Information

JUDGMENT

Anil Kumar, J.

1. This writ petition has been filed by the petitioner, Union of India, seeking the quashing of the order/judgment dated 8th August, 2006 passed by respondent No. 1, Central Information Commission, directing the production of the document/correspondences, disclosure of which was sought by respondent No. 2, Shri C. Ramesh, under the provisions of the Right to Information Act, 2005. The brief facts of the case are that the respondent No. 2, Shri C. Ramesh, by way of an application under Section 6 of the Right to Information Act, 2005 sought the disclosure from the Central Public Information Officer (hereinafter referred to as "CPIO") of all the letters sent by the former President of India, Shri K.R. Narayanan, to the then Prime Minister, Shri A.B. Vajpayee, between 28th February, 2002 to 15th March, 2002 relating to "Gujarat riots".

2. The CPIO by a communication dated 28th November, 2005 denied the request of respondent No. 2 on the following grounds:-

(1).....that Justice Nanavati/Justice Shah commission of enquiry had also asked for the correspondence between the President, late

Shri K.R. Narayanan and the former Prime minister on Gujarat riots and the privilege under section 123 & 124 of the Indian Evidence Act, 1872 and Article 74(2) read with Article 78 and 361 of the Constitution of India has been claimed by the Government, for production of those documents;

(2).....that in terms of Section 8(1) (a) of the Right to Information Act, 2005, the information asked for by you, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State etc.

3. The respondent No. 2, thereafter, filed an appeal under Section 19(1) of the Right to Information Act, 2005 before the Additional Secretary (S & V), Department of Personnel and Training, who is the designated first appellate authority under the Act, against the order of the CPIO on the ground that the Right to Information Act, 2005 has an overriding effect over the Indian Evidence Act, 1872 and that the document disclosure of which was sought by him are not protected under Section 8 of the Right to Information Act, 2005 or Articles 74(2), 78 and 361 of the Constitution of India, which appeal was also dismissed by an order dated 2nd January, 2006. The respondent No. 2 aggrieved by the order of the first appellate authority preferred a second appeal under Section 19(3) of the Act before the Commission, Respondent No. 1. The Commission after hearing the appeal by an order dated 7th July,

2006 referred the same to the full bench of the Commission, respondent No. 1, for re-hearing.

4. After hearing the appeal, the full bench of the Commission, upholding the contentions of respondent No. 2 passed an order/judgment dated 8th August, 2006, calling for the correspondences, disclosure of which was sought by the respondent No. 2 under the provisions of the Right to Information Act, so that it can examine as to whether the disclosure of the same would serve or harm the public interest, after which, appropriate direction to the public authority would be issued. This order dated 8th August, 2006 is under challenge. The direction issued by respondent No. 1 is as under:-

The Commission, after careful consideration has, therefore, decided to call for the correspondence in question and it will examine as to whether its disclosure will serve or harm the public interest. After examining the documents, the Commission will first consider whether it would be in public interest to order disclosure or not, and only then it will issue appropriate directions to the public authority.

5. The order dated 8th August, 2006 passed by the Central Information Commission, respondent No. 1, has been challenged by the petitioner on the ground that the provisions of the Right to Information Act, 2005 should be construed in the light of the provisions of the Constitution of India; that by virtue of Article 74(2) of the Constitution of India, the advice tendered by the Council of Ministers to the President is beyond the judicial inquiry and that the bar as contained in Article 74(2) of the Constitution of India would be applicable to the correspondence exchanged between the President and the Prime Minister. Thus, it is urged that the consultative process between the then President and the then Prime Minister, enjoys immunity. Further it was contended that since the correspondences exchanged cannot be enquired into by any Court under Article

74(2) consequently respondent No. 1 cannot look into the same. The petitioner further contended that even if the documents form a part of the preparation of the documents leading to the formation of the advice tendered to the President, the same are also "privileged". According to the petitioner since the correspondences are privileged, therefore, it enjoys the immunity from disclosure, even in proceedings initiated under the Right to Information Act, 2005.

6. The petitioner further contended that by virtue of Article 361 of the Constitution of India the deliberations between the Prime Minister and the President enjoy complete immunity as the documents are "classified documents" and thus it enjoys immunity from disclosure not because of their contents but because of the class to which they belong and therefore the disclosure of the same is protected in public interest and also that the protection of the documents from scrutiny under Article 74(2) of the Constitution of India is distinct from the protection available under Sections 123 and 124 of the Indian Evidence Act, 1872. Further it was contended that the documents which are not covered under Article 74(2) of the Constitution, privilege in respect to those documents could be claimed under section 123 and 124 of the Evidence Act.

7. The petitioner stated that the freedom of speech and expression as provided under Article 19(1)(a) of the Constitution of India, which includes the right to information, is subject to Article 19(2) of the Constitution of India wherein restrictions can be imposed on the fundamental rights of freedom of speech and expression. Therefore, it was contended that the right to information cannot have a overriding effect over and above the provisions of Article 19(2) of the Constitution of India and since the Right to Information, Act originates from the Constitution of India the same is secondary and is subject to the provisions of the

Constitution. The petitioner contended that the observation of respondent No. 1 that the Right to Information Act, 2005 erodes the immunity and the privilege afforded to the cabinet and the State under Articles 74(2), 78 and 361 of the Constitution of India is patently erroneous as the Constitution of India is supreme over all the laws, statutes, regulations and other subordinate legislations both of the Centre, as well as, of the State. The petitioner has sought the quashing of the impugned judgment on the ground that the disclosure of the information which has been sought by respondent No. 2 relates to Gujarat Riots and any disclosure of the same would prejudicially affect the national security, sovereignty and integrity of India, which information is covered under Sections 8(1)(a) and 8(1)(i) of the RTI Act. It was also pointed out by the petitioner that in case of conflict between two competing dimensions of the public interest, namely, right of citizens to obtain disclosure of information vis-à-vis right of State to protect the information relating to the crucial state of affairs in larger public interest, the later must be given preference.

8. Respondent No. 2 has filed a counter affidavit refuting the averments made by the petitioner. In the affidavit, respondent No. 2 relying on section 18(3) & (4) of the Right to Information Act, 2005 has contended that the Commission, which is the appellate authority under the RTI Act, has absolute power to call for any document or record from any public authority, disclosure of which documents, before the Commission cannot be denied on any ground in any other Act. Further the impugned order is only an interim order passed by the Commission by way of which the information in respect of which disclosure was been sought has only been summoned in a sealed envelope for perusal or inspection by the commission after which the factum of disclosure of the same to the public would be decided and that the petitioner by challenging this order is misinterpreting

the intent of the provisions of the Act and is questioning the authority of the Commission established under the Act. It was also asserted by respondent No. 2 that the Commission in exercise of its jurisdiction in an appeal can decide as to whether the exemption stipulated in Section 8(1)(a) of the RTI Act is applicable in a particular case, for which reason the impugned order was passed by the Commission, and thus by prohibiting the disclosure of information to the Commission, the petitioner is obstructing the Commission from fulfilling its statutory duties. Also it is urged that the Right to Information Act, 2005 incorporates all the restrictions on the basis of which the disclosure of information by a public authority could be prohibited and that while taking recourse to section 8 of the Right to Information Act for denying information one cannot go beyond the parameters set forth by the said section. The respondent while admitting that the Right to Information Act cannot override the constitutional provisions, has contended that Articles 74(2), 78 and 361 of the Constitution do not entitle public authorities to claim privilege from disclosure. Also it is submitted that the veil of confidentiality and secrecy in respect of cabinet papers has been lifted by the first proviso to section 8(1)(i) of the Right to Information Act, which is only a manifestation of the fundamental right of the people to know, which in the scheme of Constitution overrides Articles 74(2), 78 and 361 of the Constitution. Respondent No. 2 contended that the information, disclosure of which has been sought, only constitutes the documents on the basis of which advice was formed/decision was made and the same is open to judicial scrutiny as under Article 74(2) the Courts are only precluded from looking into the "advice" which was tendered to the President. Thus in terms of Article 74(2) there is no bar on production of all the material on which the ministerial advice was based. The

respondent also contended that in terms of Articles 78 and 361 of the constitution which provides for participatory governance, the Government cannot seek any privilege against its citizens and under the Right to Information Act what cannot be denied to the Parliament cannot be denied to a citizen. Relying on Section 22 of the Right to Information Act the respondent has contended that the Right to Information Act overrides not only the Official Secrets Act but also all other acts which ipso facto includes Indian Evidence Act, 1872, by virtue of which no public authority can claim to deny any information on the ground that it happens to be a “privileged” document under the Indian Evidence Act, 1872. The respondent has sought the disclosure of the information as same would be in larger public interest, as well as, it would ensure the effective functioning of a secular and democratic country and would also check non performance of public duty by people holding responsible positions in the future.

9. This Court has heard the learned counsel for the parties and has carefully perused the writ petition, counter affidavit, rejoinder affidavit and the important documents filed therein. The question which needs determination by this Court, which has been agreed by all the parties, is whether the Central Information Commission can peruse the correspondence/ letters exchanged between the former President of India and the then Prime Minister of India for the relevant period from 28th February, 2002 till 1st March, 2002 in relation to “Gujarat riots” in order to decide as to whether the disclosure of the same would be in public interest or not and whether the bar under Article 74(2) will be applicable to such correspondence which may have the advice of Council of Minister or Prime Minister.

10. The Central Information Commission dealt with the following issues while considering the request of respondent No. 2:

- (1) Whether the Public Authority’s claim of privilege under the Law of Evidence is justifiable under the RTI Act 2005?
- (2) Whether the CPIO or Public Authority can claim immunity from disclosure under Article 74(2) of the Constitution?
- (3) Whether the denial of information to the appellant can be justified in this case under section 8(1) (a) or under Section 8(1) (e) of the Right to Information Act 2005?
- (4) Whether there is any infirmity in the order passed by the CPIO or by the Appellate Authority denying the requested information to the Appellant?

While dealing with the first issue the Central Information Commission observed that on perusing Section 22 of the Right to Information Act, 2005, it was clear that it not only overrides the Official Secrets Act, but also all other laws and that ipso facto it includes the Indian Evidence Act as well. Therefore, it was held that no public authority could claim to deny any information on the ground that it happens to be a “privileged” one under the Indian Evidence Act. It was also observed that Section 2 of the Right to Information Act cast an obligation on all public authorities to provide the information so demanded and that the right thus conferred is only subject to the other provisions of the Act and to no other law. The CIC also relied on the following cases:

- (1) S.R. Bommai vs. Union of India: MANU/SC/0444/1994 : AIR 1994 SC 1918, wherein it was held that Article 74(2) is no bar to the production of all the material on which the ministerial advice was based.
- (2) Rameshwar Prasad and Ors. vs. Union of India and Anr. MANU/SC/0399/2006 : AIR 2006 SC 980 wherein the above ratio was further clarified.
- (3) SP Gupta vs. Union of India, 1981 SCC Supp. 87 case, wherein it was held that what is

protected from disclosure under clause (2) of the Article 74 is only the advice tendered by the Council of Ministers. The reasons that have weighed with the Council of Ministers in giving the advice would certainly form part of the advice. But the material on which the reasoning of the Council of Ministers is based and advice given cannot be said to form part of the advice. It was also held that disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

- (4) R.K. Jain vs. Union of India & Ors. MANU/SC/0291/1993 : AIR 1993 SC 1769 wherein the SC refused to grant a general immunity so as to cover that no document in any particular class or one of the categories of Cabinet papers or decisions or contents thereof should be ordered to be produced.

Based on the decisions of the SC in the above cases, the CIC had also inferred that Article 74(2), 78 and 361 of the Constitution of India do not per se entitle the public authorities to claim privilege from disclosure.

11. However, instead of determining whether the correspondence in question comes under the special class of documents exempted from disclosure on account of bar under Article 74 (2) of the Constitution of India, the CIC has called for it in order to examine the same. The petitioners have contended that the CIC does not have the power to call for documents that have been expressly excluded under Article 74(2), read with Article 78 and Article 361 of the Indian Constitution, as well as the provisions of the Right to Information Act, 2005 under which the CIC is established and which is also the source of all its power. As per the learned counsel for the petitioner, the exemption from the disclosure is validated by Section 8(1)(a) and Section 8(1)(i) of the Right to Information

Act, 2005 as well. The respondents, however, have contended that the correspondence is not expressly barred from disclosure under either the Constitution or the Provisions of the Right to Information Act, 2005. Therefore, the relevant question to be determined by this Court is whether or not the correspondence remains exempted from disclosure under Article 74(2) of the Constitution of India or under any provision of the Right to information Act, 2005. If the answer to this query is in the affirmative then undoubtedly what stands exempted under the Constitution cannot be called for production by the CIC as well. Article 74 (2) of the Constitution of India is as under:

74. Council of Ministers to aid and advise President.-

- (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice: [Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]
- (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

12. Clearly Article 74(2) bars the disclosure of the advice rendered by the Council of Ministers to the President. What constitutes this advice is another query that needs to be determined. As per the learned counsel for the petitioner, the word “advice” cannot constitute a single instance or opinion and is instead a collaboration of many discussions and to and fro correspondences that give result to the ultimate opinion formed on the matter. Hence the correspondence sought for is an intrinsic part of the “advice” rendered by the Council

of Ministers and the correspondence is not the material on which contents of correspondence, which is the advise, has been arrived at and therefore, it is barred from any form of judicial scrutiny.

13. The respondents have on the other hand have relied on the judgments of S.R. Bommai vs. Union of India: MANU/SC/0444/1994 : AIR 1994 SC 1918; Rameshwar Prasad and Ors. vs. Union of India and Anr. MANU/SC/0399/2006 : AIR 2006 SC 980 and SP Gupta vs. Union of India, 1981 SCC Supp. 87, with a view to justify that Article 74(2) only bars disclosure of the final “advice” and not the material on which the “advice” is based.

14. However, on examining these case laws, it is clear that the factual scenario which were under consideration in these matters, where wholly different from the circumstances in the present matter. Even the slightest difference in the facts could render the ratio of a particular case otiose when applied to a different matter.

15. A decision is an authority for which it is decided and not what can logically be deduced therefrom. A little difference in facts or additional facts may make a lot of difference in the precedent value of a decision. In Bhavnagar University v. Palitana Sugar Mill (P) Ltd., MANU/SC/1092/2002 : (2003) 2 SCC 111, at page 130, the Supreme Court had held in para 59 relying on various other decision as under:

59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See Ram Rakhi v. Union of India AIR 2002 Del 458 (db), Delhi Admn. (NCT of Delhi) v. Manohar Lal MANU/SC/0713/2002 : (2002) 7 SCC 222, Haryana Financial Corpn. v. Jagdamba Oil Mills MANU/SC/0056/2002 : (2002) 3 SCC 496 and Nalini Mahajan (Dr) v. Director of Income Tax

(Investigation) MANU/DE/0573/2002 : (2002) 257 ITR 123 (Del).]

16. In Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr. (AIR 2004 SC 778), the Supreme Court had held that a decision cannot be relied on without considering the factual situation. In the said judgment the Supreme Court had observed:-

Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid’s theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

17. In the case of S.R. Bommai (supra) Article 74(2) and its scope was examined while evaluating if the President’s functions were within the constitutional limits of Article 356, in the matter of his satisfaction. The extent of judicial scrutiny allowed in such an evaluation was also ascertained. The matter dealt with the validity of the dissolution of the Legislative Assembly of States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan, by the President under Article 356, which was challenged.

18. Similarly in Rameshwar Prasad (supra) since no political party was able to form a Government, President’s rule was imposed under Article 356 of the Constitution over the State of Bihar and consequently the Assembly was kept in suspended animation. Thereafter,

the assembly was dissolved on the ground that attempts are being made to cobble a majority by illegal means as various political parties/groups are trying to allure elected MLAs and that if these attempts continue it would amount to tampering of the constitutional provisions. The issue under consideration was whether the proclamation dissolving the assembly of Bihar was illegal and unconstitutional. In this case as well reliance was placed on the judgment of S.R. Bommai (supra). However it is imperative to note that only the decision of the President, taken within the realm of Article 356 was judicially scrutinized by the Supreme Court. Since the decision of the President was undoubtedly based on the advice of the Council of Ministers, which in turn was based on certain materials, the evaluation of such material while determining the justifiability of the President's Proclamation was held to be valid.

19. Even in the case of S.P Gupta (supra) privilege was claimed against the disclosure of correspondences exchanged between the Chief Justice of the Delhi High Court, Chief Justice of India and the Law Minister of the Union concerning extension of the term of appointment of Addl. Judges of the Delhi High Court. The Supreme Court had called for disclosure of the said documents on the ground that the non disclosure of the same would cause greater injury to public interest than what may be caused by their disclosure, as the advice was tendered by the Council of Ministers after consultation with the Chief Justice of Delhi High Court and the Chief Justice of India and thus it was held that the views expressed by the Chief justices could not be said to be an advice and therefore there is no bar on its disclosure.

20. It will be appropriate to consider other precedents also relied on by the parties at this stage. In State of U.P. vs. Raj Narain, MANU/SC/0032/1975 : AIR 1975 SC 865 the document in respect of which exclusion from production was claimed was the Blue Book containing the

rules and instructions for the protection of the Prime Minister, when he/she is on tour or travelling. The High Court rejected the claim of privilege under section 123 of the Evidence Act on the ground that no privilege was claimed in the first instance and that the blue book is not an unpublished document within the meaning of section 123 of Indian Evidence Act, as a portion of it had been published, which order had been challenged. The Supreme Court while remanding the matter back to the High Court held that if, on the basis of the averments in the affidavits, the court is satisfied that the Blue Book belongs to a class of documents, like the minutes of the proceedings of the cabinet, which is per se entitled to protection, then in such case, no question of inspection of that document by the court would arise. If, however, the court is not satisfied that the Blue Book belongs to that class of privileged documents, on the basis of the averments in the affidavits and the evidence adduced, which are not sufficient to enable the Court to make up its mind that its disclosure will injure public interest, then it will be open to the court to inspect the said documents for deciding the question of whether it relates to affairs of the state and whether its disclosure will injure public interest.

21. In R.K. Jain vs. Union Of India, MANU/SC/0291/1993 : AIR 1993 SC 1769 the dispute was that no Judge was appointed as President in the Customs Central Excise and Gold (Control) Appellate Tribunal, since 1985 and therefore a complaint was made. Notice was issued and the ASG reported that the appointment of the President has been made, however, the order making the appointment was not placed on record. In the meantime another writ petition was filed challenging the legality and validity of the appointment of respondent No. 3 as president and thus quashing of the said appointment order was sought. The relevant file on which the decision regarding

appointment was made was produced in a sealed cover by the respondent and objection was raised regarding the inspection of the same, as privilege of the said documents was claimed. Thereafter, an application claiming privilege under sections 123, 124 of Indian Evidence Act and Article 74(2) of the Constitution was filed. The Government in this case had no objection to the Court perusing the file and the claim of privilege was restricted to disclosure of its contents to the petitioner. The issue before the Court was whether the Court would interfere with the appointment of Shri Harish Chander as President following the existing rules. Considering the circumstances, it was held that it is the duty of the Minister to file an affidavit stating the grounds or the reasons in support of the claim of immunity from disclosure in view of public interest. It was held that the CEGAT is a creature of the statute, yet it intended to have all the flavors of judicial dispensation by independent members and President, therefore the Court ultimately decided to set aside the appointment of Harish Chandra as President.

22. In *People's Union For Civil Liberties & Anr. vs. Union of India (UOI) and Ors.* MANU/SC/0019/2004 : AIR 2004 SC 1442, the appellants had sought the disclosure of information from the respondents relating to purported safety violations and defects in various nuclear installations and power plants across the country including those situated at Trombay and Tarapur. The respondents claimed privilege under Section 18 (1) of the Atomic Energy Act, 1962 on the ground that the same are classified as "Secrets" as it relates to nuclear installations in the country which includes several sensitive facilities carried out therein involving activities of classified nature and that publication of the same would cause irreparable injury to the interest of the state and would be prejudicial to the national security. The Court while deciding the controversy had

observed that the functions of nuclear power plants are sensitive in nature and that the information relating thereto can pose danger not only to the security of the state but to the public at large if it goes into wrong hands. It was further held that a reasonable restriction on the exercise of the right is always permissible in the interest of the security of the state and that the functioning and the operation of a nuclear plant is information that is sensitive in nature. If a reasonable restriction is imposed in the interest of the State by reason of a valid piece of legislation the Court normally would respect the legislative policy behind the same. It was further held that that normally the court will not exercise power of judicial review in such matters unless it is found that formation of belief by the statutory authority suffers from mala fides, dishonesty or corrupt practices. For a claim of immunity under Section 123 of the IEA, the final decision with regard to the validity of the objection is with the Court by virtue of section 162 of IEA. The balancing between the two competing public interests (i.e. public interest in withholding the evidence be weighed against public interest in administration of justice) has to be performed by the Court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, as there is no absolute immunity for documents belonging to such class. The Court further held that there is no legal infirmity in the claim of privilege by the Government under Section 18 of the Atomic Energy Act and also that perusal of the report by the Court is not required in view of the object and the purport for which the disclosure of the report of the Board was withheld.

23. In *Dinesh Trivedi vs. Union of India* MANU/SC/1138/1997 : (1997) 4 SCC 306, the petitioner had sought making public the complete Vohra Committee Report on criminalization

of politics including the supporting material which formed the basis of the report as the same was essential for the maintenance of democracy and ensuring that the transparency in government was secured and preserved. The petitioners sought the disclosure of all the annexures, memorials and written evidence that were placed before the committee on the basis of which the report was prepared. The issue before the Court was whether the supporting material (comprising of reports, notes and letters furnished by other members) placed before the Vohra Committee can be disclosed for the benefit of the general public. The Court had observed that Right to know also has recognized limitations and thus by no means it is absolute. The Court while perusing the report held that the Vohra Committee Report presented in the parliament and the report which was placed before the Court are the same and that there is no ground for doubting the genuineness of the same. It was held that in these circumstances the disclosure of the supporting material to the public at large was denied by the court, as instead of aiding the public it would be detrimentally overriding the interests of public security and secrecy.

24. In *State of Punjab vs. Sodhi Sukhdev Singh*, MANU/SC/0006/1960 : AIR 1961 SC 493, on the representation of the District and Sessions Judge who was removed from the services, an order was passed by the Council of Ministers for his re-employment to any suitable post. Thereafter, the respondent filed a suit for declaration and during the course of the proceedings he also filed an application under Order 14, Rule 4 as well as Order 11, Rule 14 of the Civil Procedure Code for the production of documents mentioned in the list annexed to the application. Notice for the production of the documents was issued to the appellant who claimed privilege under section 123 of the IEA in respect of certain documents. The Trial Court had upheld the claim of privilege. However, the

High Court reversed the order of the Trial Court in respect of four documents. The issue before the Supreme Court was whether having regard to the true scope and effect of the provisions of Sections 123 and 162 of the Act, the High Court was in error in refusing to uphold the claim of privilege raised by the appellant in respect of the documents in question. The contention of the petitioner was that under Sections 123 and 162 when a privilege is claimed by the State in the matter of production of State documents, the total question with regard to the said claims falls within the discretion of the head of the department concerned, and he has to decide in his discretion whether the document belongs to the privileged class and whether or not its production would cause injury to public interest. The Supreme Court had ultimately held that the documents were “privilege documents” and that the disclosure of the same cannot be asked by the appellant through the Court till the department does not give permission for their production.

25. In *S.P. Gupta (supra)* the Supreme Court had observed that a seven Judges’ bench had already held that the Court would allow the objection to disclosure, if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of the State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document. It was further observed that in a democracy, citizens are to know what their Govt. is doing. No democratic Govt. can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Govt. It is only if the people know how

the Govt. is functioning and that they can fulfill the democratic rights given to them and make the democracy a really effective and participatory democracy. There can be little doubt that exposure to public scrutiny is one of the surest means of running a clean and healthy administration. Therefore, disclosure of information with regard to the functioning of the Govt. must be the rule and secrecy can be exceptionally justified only where strict requirement of public information is assumed. It was further observed that the approach of the Court must be to alleviate the area of secrecy as much as possible constantly with the requirement of public interest bearing in mind, at all times that the disclosure also serves an important aspect of public interest. In that the said case, the correspondence between the constitutional functionaries was inspected by the Court and disclosed to the opposite parties to formulate their contentions.

26. It was further held that under Section 123 when immunity is claimed from disclosure of certain documents, a preliminary enquiry is to be held in order to determine the validity of the objections to production which necessarily involves an enquiry in the question as to whether the evidence relates to an affairs of State under Section 123 or not. In this enquiry the court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of the State, it should leave it to the head of the department to decide whether he should permit its production or not. "Class Immunity" under Section 123 contemplated two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the

withholding of documents; which must be produced if justice is to be done. It is for the Court to decide the claim for immunity against disclosure made under Section 123 by weighing the competing aspects of public interest and deciding which, in the particular case before the court, predominates. It would thus seem clear that in the weighing process, which the court has to perform in order to decide which of the two aspects of public interest should be given predominance, the character of the proceeding, the issues arising in it and the likely effect of the documents on the determination of the issues must form vital considerations, for they would affect the relative weight to be given to each of the respective aspects of public interest when placed in the scales.

27. In these circumstance the Court had called for the disclosure of documents on the ground that the non disclosure of the same would cause greater injury to public interest than what may be caused by their disclosure as the advice was tendered by the Council of Ministers after consultation with the Chief Justice of High Court and Chief Justice of India and the views expressed by the Chief Justices could not be said to be an advice and therefore it was held that there is no bar to its disclosure. Bar of judicial review is on the factum of advice but not on the reasons i.e. material on which the advice was founded.

28. These are the cases where for proper adjudication of the issues involved, the court was called upon to decide as to under what situations the documents in respect of which privilege has been claimed can be looked into by the Court.

29. The CIC, respondent No. 1 has observed that Article 74(2), 78 and 361 of the Constitution of India do not per se entitle the public authorities to claim privilege from disclosure. The respondent No. 1 had observed that since the Right to information Act has come into force, whatever immunity from disclosure

could have been claimed by the State under the law, stands virtually extinguished, except on the ground explicitly mentioned under Section 8 and in some cases under Section 11 of the RTI Act. Thus, CIC has held that the bar under Section 74(2) is not absolute and the bar is subject to the provisions of the RTI Act and the only exception for not disclosing the information is as provided under Sections 8 & 11 of the RTI Act. The proposition of the respondent No. 1 is not logical and cannot be sustained in the facts and circumstances. The Right to Information Act cannot have overriding effect over the Constitution of India nor can it amend, modify or abrogate the provisions of the Constitution of India in any manner. Even the CIC cannot equate himself with the Constitutional authorities, the Judges of the Supreme Court of India and all High Courts in the States.

30. The respondent No. 1 has also tried to create an exception to Article 74(2) on the ground that the bar within Article 74(2) will not be applicable where correspondence involves a sensitive matter of public interest. The CIC has held as under:-

.....Prima facie the correspondence involves a sensitive matter of public interest. The sensitivity of the matter and involvement of larger public interest has also been admitted by all concerned including the appellant. in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make final decision depending upon the particular facts involved in each individual case.....therefore we consider it appropriate that before taking a final decision on this appeal, we should personally examine the documents to decide whether larger public interest would require disclosure of the documents in question or not...

31. The above observation of respondent No. 1 is legally not tenable. Right to Information

Act, 2005 which was enacted by the Legislature under the powers given under the Constitution of India cannot abrogate, amend, modify or change the bar under Article 74(2) as has been contended by the respondent No. 1. Even if the RTI Act overrides Official Secrets Act, the Indian Evidence Act, however, this cannot be construed in such a manner to hold that the Right to Information Act will override the provisions of the Constitution of India. The learned counsel for the respondent No. 2 is unable to satisfy this Court as to how on the basis of the provisions of the RTI Act the mandate of the Constitution of India can be amended or modified. Amendment of any of the provisions of the Constitution can be possible only as per the procedure provided in the Constitution, which is Article 368 and the same cannot be deemed to be amended or obliterated merely on passing of subsequent Statutes. There can be no doubt about the proposition that the Constitution is supreme and that all the authorities function under the Supreme Law of land. For this *Golak Nath v. State of Punjab*, MANU/SC/0029/1967 : AIR 1967 SC 1643 can be relied on. In these circumstances, the plea of the respondents that since the Right to Information Act, 2005 has come into force, whatever bar has been created under Article 74(2) stands virtually extinguished is not tenable. The plea is not legally sustainable and cannot be accepted.

32. A bench of this Court in *Union of India v. CIC*, 165 (2009) DLT 559 had observed as under:-

...when Article 74 (2) of the Constitution applies and bars disclosure, information cannot be furnished. RTI Act cannot and does not have the ability and mandate to negate the constitutional protection under Article 74 (2). The said Article refers to inquiry by Courts but will equally apply to CIC.

Further it has been observed in para 34 as under:-

....Possibly the only class of documents which are granted immunity from disclosure is those mentioned under Article 74 (2) of the Constitution. These are documents or information which are granted immunity from disclosure not because of their contents but because of the class to which they belong.

33. In the circumstances, the bar under Article 74(2) cannot be diluted and whittled down in any manner because of the class of documents it relates to. The respondent No. 1 is not an authority to decide whether the bar under Article 74(2) will apply or not. If it is construed in such a manner then the provision of Article 74(2) will become subserving to the provisions of the RTI Act which was not the intention of the Legislature and even if it is to be assumed that this is the intention of the Legislature, such an intension, without the amendment to the Constitution cannot be sustained.

34. The judgments relied on by the CIC have been discussed hereinbefore. It is apparent that under Article 74(2) of the Constitution of India there is no bar to production of all the material on which the advice rendered by the Council of Ministers or the Prime Minister to the President is based.

35. The correspondence between the President and the Prime Minister will be the advice rendered by the President to the Council of Ministers or the Prime Minister and vice versa and cannot be held that the information in question is a material on which the advice is based.

In any case the respondent No. 2 has sought copies of the letters that may have been sent by the former President of India to the Prime Minister between the period 28th February, 2002 to 15th March, 2002 relating to the Gujarat riots. No exception to Article 74(2) of the Constitution of India can be carved out by the respondents on the ground that disclosure of the truth to the public about the stand taken by the Government during the Gujarat carnage

is in public interest. Article 74(2) contemplates a complete bar in respect of the advice tendered, and no such exception can be inserted on the basis of the alleged interpretation of the provisions of the Right to Information Act, 2005.

36. The learned counsel for the respondents are unable to satisfy this Court that the documents sought by the respondent No. 2 will only be a material and not the advice tendered by the President to the Prime Minister and vice versa. In case the correspondence exchanged between the President of India and the Prime Minister during the period 28th February, 2002 to 15th March, 2002 incorporates the advice once it is disclosed to the respondent No. 1, the bar which is created under Article 74(2) cannot be undone.

37. In the case of *S.R. Bommai v. Union of India*, MANU/SC/0444/1994 : (1994) 3 SCC 1 at page 242, Para 323 the Supreme Court had held as under:-

But, Article 74(2) does not and cannot mean that the Government of India need not justify the action taken by the President in the exercise of his functions because of the provision contained therein. No such immunity was intended - or is provided - by the clause. If the act or order of the President is questioned in a court of law, it is for the Council of Ministers to justify it by disclosing the material which formed the basis of the act/order..... The court will not ask whether such material formed part of the advice tendered to the President or whether that material was placed before the President. The court will not also ask what advice was tendered to the President, what deliberations or discussions took place between the President and his Ministers and how was the ultimate decision arrived at..... The court will only see what was the material on the basis of which the requisite satisfaction is formed and whether it is relevant to the action under Article 356(1). The court will not go into the

correctness of the material or its adequacy.

The Supreme Court in para 324 had held as under:-

24. In our respectful opinion, the above obligation cannot be evaded by seeking refuge under Article 74(2). The argument that the advice tendered to the President comprises material as well and, therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. The material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice. The material may be placed before the President to acquaint him - and if need be to satisfy him - that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Article 74(2). But it is difficult to appreciate how does the supporting material become part of advice. The respondents cannot say that whatever the President sees - or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the court.

38. The plea of the respondents that the correspondence may not contain the advice but it will be a material on which the advice is rendered is based on their own assumption. On such assumption the CIC will not be entitled to get the correspondences and peruse the same and negate the bar under said Article of the Constitution of India. As already held the CIC cannot claim parity with the Judges of Supreme Court and the High Courts. The Judges of Supreme Court and the High Courts may peruse the material in exercise of their power under Article 32 and 226 of the Constitution

of India, however the CIC will not have such power.

39. In the case of S.P. Gupta (supra) the Supreme Court had held that what is protected against disclosure under clause (2) of Article 74 is the advice tendered by the Council of Ministers and the reason which weighed with the Council of Ministers in giving the advice would certainly form part of the advice.

40. In case of Doypack Systems Pvt Ltd v. Union of India, MANU/SC/0300/1988 : (1988) 2 SCC 299 at para 44 the Supreme Court after examining S.P. Gupta (supra) had held as under:-

44. Shri Nariman however, submitted on the authority of the decision of this Court in S.P. Gupta v. Union of India that the documents sought for herein were not privileged.

The context and the nature of the documents sought for in S.P. Gupta case were entirely different. In this case these documents as we see are part of the preparation of the documents leading to the formation of the advice tendered to the President of India and as such these are privileged under Article 74(2) of the Constitution which provides that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired into in any court. This Court is precluded from asking for production of these documents.....

....It is well to remember that it is the duty of this Court to prevent disclosure where Article 74(2) is applicable.

41. The learned counsel for the respondents had laid lot of emphasis on S.P.Gupta (supra) however, the said case was not about what advice was tendered to the President on the appointment of Judges but the dispute was whether there was the factum of effective consultation. Consequently the propositions raised on behalf of the respondents on the basis of the ratio of S.P.Gupta will not be applicable

in the facts and circumstances and the pleas and contentions of the respondents are to be repelled.

42. The Commission under the Right to Information Act, 2005 has no such constitutional power which is with the High Court and the Supreme Court under Article 226 & 32 of the Constitution of India, therefore, the interim order passed by the CIC for perusal of the record in respect of which there is bar under Article 74(2) of the Constitution of India is wholly illegal and unconstitutional. In *Doypack Systems (supra)* at page 328 the Supreme Court had held as under:-

43. The next question for consideration is that by assuming that these documents are relevant, whether the Union of India is liable to disclose these documents. Privilege in respect of these documents has been sought for under Article 74(2) of the Constitution on behalf of the Government by learned Attorney General.

44. Shri Nariman however, submitted on the authority of the decision of this Court in *S.P. Gupta v. Union of India* that the documents sought for herein were not privileged. The context and the nature of the documents sought for in *S.P. Gupta* case were entirely different. In this case these documents as we see are part of the preparation of the documents leading to the formation of the advice tendered to the President of India and as such these are privileged under Article 74(2) of the Constitution which provides that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired into in any court. This Court is precluded from asking for production of these documents. In *S.P. Gupta* case the question was not actually what advice was tendered to the President on the appointment of judges. The question was whether there was the factum of effective consultation between the relevant constitutional authorities. In our opinion that is not the problem here. We are conscious that

there is no sacrosanct rule about the immunity from production of documents and the privilege should not be allowed in respect of each and every document. We reiterate that the claim of immunity and privilege has to be based on public interest. Learned Attorney-General relied on the decision of this Court in the case of *State of U.P. v. Raj Narain*. The principle or ratio of the same is applicable here. We may however, reiterate that the real damage with which we are concerned would be caused by the publication of the actual documents of the Cabinet for consideration and the minutes recorded in its discussions and its conclusions. It is well settled that the privilege cannot be waived. In this connection, learned Attorney General drew our attention to an unreported decision in *Elphistone Spinning and Weaving Mills Co. Ltd. v. Union of India*. This resulted ultimately in *Sitaram Mills* case.. The Bombay High Court held that the Task Force Report was withheld deliberately as it would support the petitioner's case. It is well to remember that in *Sitaram Mills* case this Court reversed the judgment of the Bombay High Court and upheld the take over. Learned Attorney General submitted that the documents there were not tendered voluntarily. It is well to remember that it is the duty of this Court to prevent disclosure where Article 74(2) is applicable. We are convinced that the notings of the officials which lead to the Cabinet note leading to the Cabinet decision formed part of the advice tendered to the President as the Act was preceded by an ordinance promulgated by the President.

45. We respectfully follow the observations in *S.P. Gupta v. Union of India* at pages 607, 608 and 609. We may refer to the following observations at page 608 of the report: (SCC pp. 280-81, para 70) "It is settled law and it was so clearly recognised in *Raj Narain* case that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in

other words, the law recognizes that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors abroad (vide *Conway v. Rimmer*) and *Reg v. Lewes Justices*, ex parte Home Secretary, papers brought into existence for the purpose of preparing a submission to cabinet (vide: *Lanyon Property Ltd. v. Commonwealth* 129 Commonwealth Law Reports 650) and indeed any documents which relate to the framing of Government policy at a high level (vide: *Re Grosvenor Hotel*, London 1964 (3) All E.R. 354 (CA)).

46. Cabinet papers are, therefore, protected from disclosure not by reason of their contents but because of the class to which they belong. It appears to us that Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet. See Geoffrey Wilson - *Cases and Materials on Constitutional and Administrative Law*, 2nd edn., pages 462 to 464. At page 463 para 187, it was observed:

The real damage with which we are concerned would be caused by the publication of the actual documents of the Cabinet for consideration and the minutes recording its discussions and its conclusions. Criminal sanctions should apply to the unauthorized communication of these papers.

43. Even in *R.K. Jain* (supra) at page 149 the Supreme Court had ruled as under:-

34. Equally every member is entitled to insist that whatever his own contribution was to the making of the decision, whether favorable or unfavorable, every other member will keep it secret. Maintenance of secrecy of an individual's contribution to discussion, or vote in the Cabinet guarantees the most favorable and conducive atmosphere to express views formally. To reveal the view, or vote, of a member of the Cabinet, expressed or given in Cabinet, is not only to disappoint an expectation on which that member was entitled to rely, but also to reduce the security of the continuing guarantee, and above all, to undermine the principle of collective responsibility. Joint responsibility supersedes individual responsibility; in accepting responsibility for joint decision, each member is entitled to an assurance that he will be held responsible not only for his own, but also as member of the whole Cabinet which made it; that he will be held responsible for maintaining secrecy of any different view which the others may have expressed. The obvious and basic fact is that as part of the machinery of the government. Cabinet secrecy is an essential part of the structure of the government. Confidentiality and collective responsibility in that scenario are twins to effectuate the object of frank and open debate to augment efficiency of public service or affectivity of collective decision to elongate public interest. To hamper and impair them without any compelling or at least strong reasons, would be detrimental to the efficacy of public administration. It would tantamount to wanton rejection of the fruits of democratic governance, and abdication of an office of responsibility and dependability. Maintaining of top secrecy of new taxation policies is a must but leaking budget proposals a day before presentation of the budget may be an exceptional occurrence as an instance.

44. Consequently for the foregoing reason there is a complete bar under Article 74(2) of the Constitution of India as to the advice tendered by the Ministers to the President and, therefore, the respondent No. 1 CIC cannot look into the advice tendered by the President to the Prime Minister and consequently by the President to the Prime Minister or council of Ministers. The learned counsel for the respondents also made an illogical proposition that the advice tendered by the Council of Ministers and the Prime Minister to the President is barred under Article 74(2) of the Constitution of India but the advice tendered by the President to the Prime Minister in continuation of the advice tendered by the Prime Minister or the Council of Ministers to the President of India is not barred. The proposition is not legally tenable and cannot be accepted. The learned counsel for the respondent No. 2, Mr. Mishra also contended that even if there is a bar under Article 74(2) of the Constitution of India, the respondent No. 2 has a right under Article 19(1) (a) to claim such information. The learned counsel is unable to show any such precedent of the Supreme Court or any High Court in support of his contention and, therefore, it cannot be accepted. The freedom of speech and expression as provided under Article 19(1)(a) of the Constitution of India, which includes the right to information, is subject to Article 19(2) of the Constitution of India wherein restrictions can be imposed on the fundamental rights of freedom of speech and expression. The right to information cannot have a overriding effect over and above the provisions of Article 19(2) of the Constitution of India and since the Right to Information, Act originates from the Constitution of India the same is secondary and is subject to the provisions of the Constitution.

45. The documents in question are deliberations between the President and the Prime Minister within the performance of powers of the President of India or his office. As submitted by the learned counsel for the petitioner such

documents by virtue of Article 361 would enjoy immunity and the immunity for the same cannot be asked nor can such documents be perused by the CIC. Thus the CIC has no authority to call for the information in question which is barred under Article 74(2) of the Constitution of India. Even on the basis of the interpretation to various provisions of the Right to Information Act, 2005 the scope and ambit of Article 74(2) cannot be whittled down or restricted. The plea of the respondents that dissemination of such information will be in public interest is based on their own assumption by the respondents. Disclosure of such an advice tendered by the Prime Minister to the President and the President to the Prime Minister, may not be in public interest and whether it is in public interest or not, is not to be adjudicated as an appellate authority by respondent No. 1. The provisions of the Right to Information Act, 2005 cannot be held to be superior to the provisions of the Constitution of India and it cannot be incorporated so as to negate the bar which flows under Article 74(2) of the Constitution of India. Merely assuming that disclosure of the correspondence between the President and the Prime Minister and vice versa which contains the advice may not harm the nation at large, is based on the assumptions of the respondents and should not be and cannot be accepted in the facts and circumstances. In the circumstances the findings of the respondent No. 1 that bar under Article 74(2), 78 & 361 of the Constitution of India stands extinguished by virtue of RTI Act is without any legal basis and cannot be accepted. The respondent No. 1 has no authority to call for the correspondent in the facts and circumstances.

46. The learned junior counsel for the respondent No. 2, Mr. Mishra who also appeared and argued has made some submissions which are legally and prima facie not acceptable. His contention that the bar under Article 74(2) of the Constitution will only be applicable in the case of the High Courts and Supreme Court while

exercising the power of judicial review and not before the CIC as the CIC does not exercise the power of judicial review is illogical and cannot be accepted. The plea that bar under Article 74(2) is not applicable in the present case is also without any basis. The learned counsel has also contended that the correspondence between the President and the Prime Minister cannot be termed as advice is based on his own presumptions and assumptions which have no legal or factual basis. As has been contended by the learned Additional Solicitor General, the bar under Article 74(2) is applicable to all Courts including the CIC. In the case of *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 at page 241 it was observed as under:-

321. Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers.

47. Consequently the bar of Article 74(2) is applicable in the facts and circumstances and the CIC cannot contend that it has such power under the Right to Information Act that it will decide whether such bar can be claimed under Article 74 (2) of the Constitution of India.. In case of *UPSC v. Shiv Shambhu*, 2008 9 AD (Delhi) 289 at para 2 a bench of this Court had held as under:-

At the outset this Court directs the deletion of the CIC which has been arrayed as Respondent No. 1 to this appeal, consequent upon it being arrayed as such in the writ petition. This Court has repeatedly issued practice directions stressing that a judicial or quasi-judicial body or Tribunal whose order is challenged in a writ petition ought not to itself be impleaded as a party respondent. The only exception would be if mala fides are alleged against any individual member of such authority or Tribunal in which case again it would be such member, and not the authority/Tribunal who may be impleaded as a respondent.

48. The respondent No. 2 has sought copies of the letters that may have been sent by the President of India to the Prime Minister during the period 28th February, 2002 to 15th March, 2002 relating to Gujarat riots. In the application submitted by respondent No. 2 for obtaining the said information, respondent No. 2 had stated as under:-

I personally feel that the contents of the letters, stated to have been sent by the former President of India to the then Prime Minister are of importance for foreclosure of truth to the public on the stand taken by the Government during the Gujarat carnage. I am therefore interested to know the contents of the letters

49. Considering the pleas and the averments made by the respondents it cannot be construed in any manner that the correspondence sought by the respondent No. 2 is not the advice rendered, and is just the material on which the advice is based. What is the basis for such an assumption has not been explained by the counsel for the respondent No. 2. The impugned order by the respondent No. 1 is thus contrary to provision of Article 74(2) and therefore it cannot be enforced and the petitioner cannot be directed to produce the letters exchanged between the President and the Prime Minister or the Council of Ministers as it would be the advice rendered by the President in respect of which there is a complete bar under Article 74(2).

50. In the case of *S.R. Bommai (supra)* at page 241 the Supreme Court had observed as under:-

321. Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers.

The Supreme Court at para 324 had also observed as under:-

..... One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Article 74(2). But it is difficult to appreciate how does the supporting material become part of advice. The respondents cannot say that whatever the President sees - or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the court.

51. Thus there is an apparent and conspicuous distinction between the advice and the material on the basis of which advice is rendered. In case of Doypack (supra) the Supreme Court had held as under:-

44. Shri Nariman however, submitted on the authority of the decision of this Court in S.P. Gupta v. Union of India that the documents sought for herein were not privileged. The context and the nature of the documents sought for in S.P. Gupta case were entirely different. In this case these documents as we see are part of the preparation of the documents leading to the formation of the advice tendered to the President of India and as such these are privileged under Article 74(2) of the Constitution which provides that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired into in any court. This Court is precluded from asking for production of these documents.....

....It is well to remember that it is the duty of this Court to prevent disclosure where Article 74(2) is applicable.

52. The learned counsel for the respondents also tried to contend that even if Article 74(2) protects the disclosure of advice from the Council of Ministers/Prime Minister to President it does not bar disclosure of communication from President to the Prime Minister. In case of PIO vs. Manohar Parikar, Writ Petition No. 478 of 2008, the Bombay High Court at Goa Bench had held that the protection under Article 361

will not be available for the Governor if any information is sought under RTI Act. However, the reliance on the said precedent cannot be made, as the same judgment has been stayed by the Supreme Court in SLP (C) No. 33124/2011 and is therefore sub judice and consequently the respondents are not entitled for any direction to produce the correspondence which contains the advice rendered by the President to the Prime Minister for the perusal by the CIC. The plea of the respondents that the CIC can call the documents under Section 18 of RTI Act, therefore, cannot be sustained. If the bar under Article 74(2) is absolute so far as it pertains to advices, even under Section 18 such bar cannot be whittled down or diluted nor can the respondents contend that the CIC is entitled to see that correspondence and consequently the respondent No. 2 is entitled for the same. For the foregoing reasons and in the facts and circumstances the order of the CIC dated 8th August, 2006 is liable to be set aside and the CIC cannot direct the petitioner to produce the correspondence between the President and the Prime Minister, and since the CIC is not entitled to peruse the correspondence between the President and the Prime Minister, as it is barred under Article 74(2) of the Constitution of India, the application of the petitioner seeking such an information will also be not maintainable. Consequently, the writ petition is allowed and the order dated 8th August, 2006 passed by Central Information Commission in Appeal No. CIC/MA/A/2006/00121 being "C. Ramesh v. Minister of Personnel & Grievance & Pension" is set aside. The application of the respondent No. 2 under Section 6 of the Right to Information Act, 2005 dated 7th November, 2005 is also dismissed, holding that the respondent No. 2 is not entitled for the correspondence sought by him which was exchanged between the President and the Prime Minister relating to the Gujarat riots. Considering the facts and circumstances the parties are, however, left to bear their own cost.

IN THE HIGH COURT OF DELHI

W.P.(C) 11271/2009

Decided On: 01.06.2012

Appellants: **Registrar of Companies & Ors.**

Vs.

Respondent: **Dharmendra Kumar Garg & Anr.**

Hon'ble Judges:

Hon'ble Mr. Justice Vipin Sanghi

Subject: Company

JUDGMENT

Vipin Sanghi, J.

1. The present writ petition has been preferred by the Registrar of Companies, NCT of Delhi & Haryana (ROC) and its CPIOs Sh. Raj Kumar Shah and Sh. Atma Shah to assail two similar orders dated 14.07.2009 passed by the Central Information Commission (CIC) in complaint case Nos. CIC/SG/C/2009/000702 and CIC/SG/C/2009/000753. By these similar orders, the appeals preferred by the same respondent-querist were allowed, rejecting the defence of the petitioners founded upon Section 610 of the Companies Act, 1956, and it was directed that the complete information sought by the respondent-querist in his two applications under the Right to Information Act (RTI Act) be provided to him before 25.07.2009. The CIC has also directed issuance of show-cause notice to the petitioner-PIOs under Section 20(1) of the RTI Act asking them to show-cause as to why penalty should not be imposed upon them for not furnishing information as sought by the querist within thirty days. The querist-Shri Dharmendra Kumar Garg filed an application under the RTI Act on 28.05.2009 requiring the PIO of the ROC to provide the following information in relation to company No. 056045

M/s Bloom Financial Services Limited:

1. Who are the directors of this company? Please provide their name, address, date of appointment and copies of consent filed at ROC alongwith F-32 filed.
2. After incorporation of above company, how many times directors were changed? Please provide the details of documents files and copies of Form 32 filed at ROC.
3. Please provide the copies of Annual Returns filed at ROC since incorporation to 1998
4. On what ground prosecution has been filed. Please provide the details of prosecution and persons included for prosecution. Please provide the copies of Order Sheets and related documents.
5. On what ground the name of Dharmender Kumar Garg has been included for prosecution?
6. Please provide the copies of Form No 5 and other documents filed for increase of capital?
7. How much fee was paid for increase of Capital of above company? Please provide the details of payment of fee at ROC.
8. Please provide the copies of Statutory Report and Special Leave Petition (Statement in lieu of prospectus) filed at ROC.

2 The PIO-Sh. Atma Shah responded to the said queries on 29.05.2009. In respect of queries

No. 1, 2, 3, 6, 7 & 8, the stand taken by the PIO was as follows:

that in view of the provisions of Section 610 of the Companies Act, 1956 read with Companies (Central Government's) General Rules and Forms, 1956 framed in exercise of powers conferred by clauses (a) & (b) of sub-section (1) of Section 642 of the Companies Act, 1956, the documents filed by companies pursuant to various provisions of the Companies Act, 1956 with the ROCs are to be treated as "information in public domain" and such information is accessible by public pursuant to the provisions of Section 610 of the Companies Act, 1956. There is an in built mechanism under the provisions of the Companies Act, 1956 for accessing information relating to documents filed which are in the public domain on payment of fees prescribed under the provisions of the Companies Act, 1956 and the Rules made there under. Hence you can obtain the desired information by inspecting the documents filed by the company in this office before filing of documents online i.e. prior to 8/03/2006 at O/o Registrar of Companies, NCT of Delhi & Haryana, 131, Sector-5, IMT Manesar, Haryana and after 18/3/06 on the Ministry's website www.mca.gov.in. Further certified copies of the desired documents can also be obtained on payment of fees prescribed thereof. In view of this, the information already available in the public domain would not be treated as "information held by or under the control of public authority" pursuant to Section 2(j) of the Right to Information Act, 2005. Therefore, the provisions of RTI Act, 2005 would not be applicable for providing inspection/copies of such documents/information to the public.

3. The queries at serial Nos. 4 & 5, as aforesaid, were also responded to by the PIO. However, I am not concerned with the answers given in response to the said queries, as the legal issue raised in the present petition by the petitioners relates to the interplay between Section 610 of

the Companies Act on the one hand, and the provisions of the RTI Act on the other hand. Not satisfied with the response given by the PIO Sh. Atma Shah, as aforesaid, the respondent-querist, without preferring a first appeal, straightway preferred an appeal before the CIC, which has been disposed of vide impugned order dated 14.07.2009 in complaint case No. CIC/SG/C/2009/000702.

4. The respondent-querist raised further queries in respect of the same company vide an RTI application dated 06.06.2009. This application was also responded to by the PIO Sh. Atma Shah on 23.06.2009. In this reply as well, in respect of certain queries, the PIO responded by placing reliance on Section 610 of the Companies Act and gave more or less the same reply, as extracted above. Since the respondent-querist was not satisfied with the said response, he preferred a petition before the CIC, once again by-passing the statutory first appeal provided under the RTI Act. This appeal was registered as complaint case No. CIC/SG/C/2009/000753.

5. Before the CIC, the petitioners contended that the information which could be accessed by any person by resort to Section 610 of the Companies Act is information which is already placed in the public domain, and it cannot be said that the said information is "held by" or is "under the control" of the public authority. It was contended that such information, as has already been placed in the public domain, does not fall within the scope of the RTI Act and a citizen cannot by-pass the procedure, and avoid paying the charges prescribed for accessing the information placed in the public domain, by resort to provisions of the RTI Act.

6. In support of their submissions, before the CIC the petitioners placed reliance on a departmental circular No. 1/2006 issued by the Ministry of Company Affairs, wherein the view taken by the Director, Inspection & Investigation was that in the light of the

provisions of Section 610 of the Companies Act read with Companies (Central Government's) General Rules & Forms, 1956 (Rules), framed in exercise of powers conferred under clauses (a) & (b) of sub-Section 1 of Section 642 of the Companies Act, the documents filed by the Companies pursuant to various provisions of the Companies Act with the ROC are to be treated as information in the public domain. It was also his view that there being a complete mechanism provided under the provisions of the Companies Act for accessing information relating to documents filed, which are in public domain, on payment of fees prescribed under the Companies Act and the Rules made thereunder, such information could not be treated as information held by, or under the control of, the public authority. His view was that the provisions of RTI Act could not be invoked for seeking copies of such information by the public.

7. The petitioners also placed reliance on various earlier orders passed by the different CICs, upholding the aforesaid stand of the ROC and, in particular, reliance was placed on the decision of Sh. A.N. Tiwari, Central Information Commissioner in F.No. CIC/80/A/2007/000112 decided on 12.04.2007. Reference was also made to various orders of Prof. M.M. Ansari, Central Information Commissioner taking the same view. The petitioner has placed all these orders before this Court as well, as Annexure A-7(Colly.)

8. The first submission of learned counsel for the petitioners is that, while passing the impugned orders, the Central Information Commissioner Sh. Shailesh Gandhi has acted with impropriety. Despite the earlier orders of two Central Information Commissioners - taking the view that the information placed by the petitioner-ROC in the public domain and accessible under Section 610 of the Companies Act are out of the purview of the RTI Act, being specifically brought to his notice, he has simply

brushed them aside after noticing them by observing that he differs with these decisions. It is submitted that even if Sh. Shailesh Gandhi, Central Information Commissioner, was of the opinion that the earlier views taken by two other learned CICs were not correct, the proper course of action for him to adopt would have been to record his reasons for not agreeing with the earlier views of the Central Information Commissioners, and to refer the said issue for determination by a larger bench of the Central Information Commission. Sitting singly, Sh. Shailesh Gandhi, Central Information Commissioner, could not have taken a contrary view by merely observing that he disagrees with the earlier views.

9. The further submission of learned counsel for the petitioners is that, even on merits, the view taken by the CIC in the impugned orders is illegal and not correct. It is argued that Clause (a) of Section 610 (1) of the Companies Act, inter alia, entitles "any person" to inspect any document kept by the Registrar, which may have been filed or registered by him in pursuance of the Companies Act, or may inspect any document, wherein the Registrar has made a record of any fact required or authorized to be recorded to be registered in pursuance of the Companies Act, on payment for each inspection of such fee, as may be prescribed.

10. Further, by virtue of Clause (b) of Section 610 (1) any person can require the Registrar to provide certified copies of the Certificate of Registration of any company, or a copy or extract of any other document, or any part of any other document, on payment in advance of such fee, as may be prescribed. It is submitted that the Registrar of Companies has placed all its records pertaining to, and in relation to the companies registered with it in the public domain. They have either been placed on the website of the ROC, or are available for inspection at the facility of the ROC. Any person can inspect such records either on-line,

or at the facility of the petitioner-ROC and if the person so desires, can also obtain copies of all or any of such documents on payment of charges, as prescribed under the Rules.

11. Learned counsel for the petitioners submits that the Companies (Central Government's) General Rules & Forms, 1956, which have been framed in exercise of the power conferred upon the Central Government by clauses (a) & (b) of sub-Section (1) of Section 642 of the Companies Act, prescribe the fees for inspection of document and for obtaining certified copies thereof in Rule 21 A, which reads as follows:

21A. Fees for inspection of documents etc.- The fee payable in pursuance of the following provisions of the Act, shall be-

- (1) Clause (a) of sub-section (1) of section 118 rupees ten.
- (2) Clause (b) of sub-section (1) of section 118 rupee one.
- (3) Sub-section (2) of section 144 rupees ten.
- (4) Clause (b) of sub-section (2) of section 163 rupees ten.
- (5) Clause (b) of sub-section (3) of section 163 rupee one.
- (6) Sub-section (2) of section 196 rupee one.
- (7) Clause (a) of sub-section (1) of section 610 rupees fifty.
- (8) Clause (b) of sub-section (1) of section 610-
- (i) For copy of certificate of incorporation rupees fifty.
- (ii) For copy of extracts of other documents including hard copy of such documents on computer readable media rupees twenty five per page.

12. Learned counsel submits that there are two kinds of information available with the ROC. The first is the information/ documents, which the ROC is obliged to receive, record and maintain

under the provisions of the Companies Act, and the second kind of information relates to the administration and functioning of the office of the ROC. The first kind of information, i.e., the returns, forms, statements, etc. received, recorded and maintained by the ROC in relation to the companies registered with it, is all available for inspection, and the certified copies thereof can be obtained by resort to Section 610 of the Companies Act and the aforesaid Rules. He submits that since this information is already in the public domain, same cannot be said to be information held by, or in the control of the public authority, i.e., ROC. He submits that it is the second kind of information, as aforesaid, which a citizen can seek by invoking provisions of the RTI Act from the ROC, and not the first kind of information which, in any event, is already available in the public domain, and accessible to one and all, including non-citizens.

13. He submits that the right to information vested by Section 3 of the RTI Act is available only to citizens. However, the right vested by virtue of Section 610 of the Companies Act can be exercised by any person, whether, or not, he is a citizen of India. Therefore, the right vested by Section 610 of the Companies Act is much wider in its scope than the right vested by Section 3 of the RTI Act. It is argued that the object of the RTI Act is to enable the citizens to access information so as to bring about transparency in the functioning of public authorities, which is considered vital to the functioning of democracy and is also essential to contain corruption and to hold governments and their instrumentalities accountable to those who are governed, i.e., the citizens. The information accessible under Section 610 is, in any event, freely available and all that the person desirous of accessing such information is required to do, is to make the application in terms of the said provision and the Rules, to become entitled to receive the information.

14. Learned counsel submits that the fees prescribed for provision of information under the RTI Act is nominal and much less compared to the fees prescribed under Rule 21 A. Learned counsel for the petitioners submits that the petitioners have consciously prescribed the fees under the RTI Act as a nominal amount of Rs.10/- per application since the petitioner-ROC does not wish to make it inconvenient or difficult for the citizens to obtain information held by or under the control of the ROC under the said Act. However, the said provision cannot be exploited or misused by a citizen for the purpose of seeking information, which is available in the public domain and is accessible under 610 of the Companies Act by payment of prescribeSectiond fee under Rule 21 A of the aforesaid Rules.

15. On the other hand, the submission of learned counsel for the respondent-querist is that the provisions of the RTI Act have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act itself. In this respect reference is made to Section 22 of the RTI Act. It is, therefore, argued that a citizen has an option to seek information from the ROC, either by resort to Section 610 of the Companies Act or by resort to the provisions of the RTI Act. Merely because Section 610 exists on the Statute Book, it does not mean that the right available under the RTI Act to seek information can be curtailed or denied.

16. Learned counsel for the respondent further submits that under Section 610 of the Companies Act, a person can access only such information which has been filed or registered by him (i.e., the person seeking the information), in pursuance of the Companies Act. He submits that the expression “being documents filed or registered by him in pursuance of this Act” used in Section 610(1)(a) of the Companies Act

connect with the words “any person” and not with the words “inspect any documents kept by the Registrar”.

17. Section 610 of the Companies Act, 1956 reads as follows:

610. Inspection, production and evidence of documents kept by Registrar.

(1) [Save as otherwise provided elsewhere in this Act, any person may]-

(a) inspect any documents kept by the Registrar [in accordance with the rules made under the Destruction of Records Act, 1917] being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection, of [such fees as may be prescribed];

(b) require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, [on payment in advance of [such fees as may be prescribed:]]

Provided that the rights conferred by this sub-section shall be exercisable-

(i) in relation to documents delivered to the Registrar with a prospectus in pursuance of sub-clause (i) of clause (b) of sub-section (1) of section 60, only during the fourteen days beginning with the date of publication of the prospectus; and at other times, only with the permission of the Central Government; and

(ii) in relation to documents so delivered in pursuance of clause (b) of sub-section (1) of section 605, only during the fourteen days beginning with the date of the prospectus; and at other times, only with the permission of the Central Government.

(2) No process for compelling the production of any document kept by the Registrar shall issue

from any Court [or the [Tribunal]] except with the leave of that Court [or the [Tribunal]] and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the Court [or the [Tribunal]].

(3) A copy of, or extract from, any document kept and registered at any of the officers for the registration of companies under this Act, certified to be a true copy under the hand of the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document’.

18. The submission of learned counsel for the respondent that only the person who has filed documents with the Registrar of Companies is entitled to inspect the same is wholly fallacious and deserves to be outrightly rejected. This interpretation is clearly not borne out either from the plain language of section 610 or upon a scrutiny of the object and purpose of the said provision. Section 610 enables ‘any person’ to inspect any documents kept by the registrar, being documents ‘filed or registered by him in pursuance of this Act’. The obligation to file and register the documents, which may be submitted by a company registered, or seeking registration with the Registrar of Companies, is that of the Registrar of Companies. It is the Registrar, who makes a record of any fact required or authorized to be recoded or registered in pursuance of the Companies Act, and not ‘any person’.

19. If the submission of learned counsel for the respondent were to be accepted, it would mean that it is the applicant under section 610, who is obliged to make a record of any fact required, or authorized to be recorded or registered in pursuance of the Companies Act, which is not the case. It is also not the obligation of ‘any person’ either to file, or to receive and put on record, or to register, the documents lodged by him in the office of the ROC. That is the obligation of the Registrar of Companies. The

whole purpose of section 610 is to bring about full and complete transparency in the matter of registration of companies and in the matter of their accounts and directorship, so that any person can obtain all the relevant information in relation to any registered company.

20. Pertinently, the language used in clause (b) does not support the submission of the respondent at all. If the submission of learned counsel for the respondent were to be accepted, it would mean that while a person can inspect only those documents which he has lodged in the office of the Registrar of Companies (by virtue of clause (a)), at the same time, under clause (b) of section 610(1), he can obtain the certificate of incorporation of any company, or a copy or extract of any other document or any part of any other document duly certified by the Registrar.

21. Section 610(2) puts a check on issuance of a process for compelling the production of any document by the Registrar, by any Court or Tribunal. It requires that such process would not be issued except with the leave of the Court or the Tribunal. This check has been placed, since any person can obtain information either through inspection, or by obtaining certified copies of documents filed by any company, by following the procedure prescribed, and a certified true copies of any such documents or extracts is admissible in evidence in all legal proceedings, and has the same efficacy and validity as the original documents filed and registered by the Registrar of Companies (see section 610(3)).

22. There can be no doubt that the documents kept by the Registrar, which are filed or registered by him, as well as the record of any fact required or authorized to be recorded by the Registrar or registered in pursuance of the Companies Act qualifies as ‘information’ within the meaning of that expression as used in Section 2(f) of the RTI Act. However, the question is - whether the mere fact that the said

documents/record constitutes 'information', is sufficient to entitle a citizen to invoke the provisions of the RTI Act to access the same?

23. The Parliament has defined the expression 'right to information' under Section 2(j). The same reads as follows:

2. (j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-

- (i) Inspection of work, documents, records;
- (ii) Taking notes, extracts, or certified copies of documents or records;
- (iii) Taking certified samples of material;
- (iv) Obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

24. The right to information is conferred by section 3 of the RTI Act, which reads as follows:

3. Right to information.-Subject to the provisions of this Act, all citizens shall have the right to information

25. Pertinently, the Parliament did not use the language in Section 3: "Subject to the provisions of this Act, citizens shall have a right to access all information, or the like. Therefore, the right conferred by Section 3 of the RTI Act, which is the substantive provision, means the right to information 'accessible under the Act which is held by or under the control of any public authority and includes"

26. It is not without any purpose that the Parliament took the trouble of defining 'right to information'. Parliament does not undertake a casual or purposeless legislative exercise. The definition of 'right to information' specifically qualifies the said right with the words:

(1) 'accessible under this Act',

(2) which is held by or under the control of any public authority.

27. The information should, firstly, be accessible under this Act. This means that if there is information which is not accessible under this Act, there is no 'right to information' in respect thereof. Consequently, there is no right to information in respect of information, which is exempted from disclosure under Section 8 or Section 9 of the RTI Act.

28. A particular information may not be held by, or may not be under the control of the public authority concerned. There would be no right in a citizen to seek such information from that particular public authority, though he may have the right to seek the same information from another public authority who holds or under whose control the desired information resides. That is why Section 6(3) provides that an application to seek information:

- (i) Which is held by another public authority;
- (ii) The subject matter of which is more closely connected with the functions of another public authority, shall be transferred to that other public authority.

29. But is that all to the expression 'held by or under the control of any public authority' used in the definition of 'Right to information' in Section 2(j) of the RTI Act?

30. In the context of the object of the RTI Act, and the various provisions thereof, in my view, the said expression 'held by or under the control of any public authority' used in section 2(j) of the RTI Act deserves a wider and a more meaningful interpretation. The expression 'Hold' is defined in the Black's Law dictionary, 6th Edition, inter alia, in the same way as 'to keep' i.e. to retain, to maintain possession of, or authority over.

31. The expression 'held' is also defined in the Shorter Oxford Dictionary, inter alia, as 'prevent

from getting away; keep fast, grasp, have a grip on'. It is also defined, inter alia, as "not let go; keep, retain".

32. The expression 'control' is defined in the Advanced Law Lexicon by P.N. Ramanatha Aiyar 3rd Edition Reprint 2009 and it reads as follows:

(As a verb) To restrain; to check; to regulate; to govern; to keep under check; to hold in restraint; to dominate; to rule and direct; to counteract; to exercise a directing, restraining or governing influence over; to govern with reference thereto; to subject to authority; to have under command, and authority over, to have authority over the particular matter. (Ame. Cyc)"

33. From the above, it appears that the expression 'held by' or 'under the control of any public authority', in relation to 'information', means that information which is held by the public authority under its control to the exclusion of others. It cannot mean that information which the public authority has already 'let go', i.e. shared generally with the citizens, and also that information, in respect of which there is a statutory mechanism evolved, (independent of the RTI Act) which obliges the public authority to share the same with the citizenry by following the prescribed procedure, and upon fulfillment of the prescribed conditions. This is so, because in respect of such information, which the public authority is statutorily obliged to disseminate, it cannot be said that the public authority 'holds' or 'controls' the same. There is no exclusivity in such holding or control. In fact, the control vests in the seeker of the information who has only to operate the statutorily prescribed mechanism to access the information. It is not this kind of information, which appears to fall within the meaning of the expression 'right to information', as the information in relation to which the 'right to information' is specifically conferred by the RTI Act is that information

which "is held by or under the control of any public authority".

34. The mere prescription of a higher charge in the other statutory mechanism (in this case Section 610 of the Companies Act), than that prescribed under the RTI Act does not make any difference whatsoever. The right available to any person to seek inspection/copies of documents under Section 610 of the Companies Act is governed by the Companies (Central Government's) General Rules & Forms, 1956, which are statutory rules and prescribe the fees for inspection of documents, etc. in Rule 21A. The said rules being statutory in nature and specific in their application, do not get overridden by the rules framed under the RTI Act with regard to prescription of fee for supply of information, which is general in nature, and apply to all kinds of applications made under the RTI Act to seek information. It would also be complete waste of public funds to require the creation and maintenance of two parallel machineries by the ROC - one under Section 610 of the Companies Act, and the other under the RTI Act to provide the same information to an applicant. It would lead to unnecessary and avoidable duplication of work and consequent expenditure.

35. The right to information is required to be balanced with the need to optimize use of limited fiscal resources. In this context I may refer to the relevant extract of the Preamble to the RTI Act which, inter alia, provides:-

*AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including **efficient operations of the Governments, optimum use of limited fiscal resources** and the preservation of confidentially of sensitive information;*

AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

(emphasis supplied).

36. Section 4(1)(a) also lays emphasis on availability of recourses, when it talks about computerization of the records. Therefore, in the exploitation and implementation of the RTI Act, a delicate and reasonable balance is required to be maintained. Nobody can go overboard or loose ones equilibrium and sway in one direction or assume an extreme position either in favour of upholding the right to information granted by the RTI Act, or to deny the said right.

37. The Supreme Court in **The Institute of Chartered Accountants of India Vs. Shaunak H. Satya & Others**, Civil Appeal No. 7571/2011 decided on 02.09.2011, observed that:

*it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under section 4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption. **The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.***

(emphasis supplied).

38. Therefore, if another statutory provision, created under any other law, vests the right to seek information and provides the mechanism for invoking the said right (which is also statutory, as in this case) that mechanism should be preserved and operated, and not destroyed merely because another general law created to empower the citizens to access information has subsequently been framed.

39. Section 4 of the RTI Act obliges every public authority, inter alia, to publish on its own, information described in clause (b) of

sub-Section (1) of Section 4. Sub-clause (xv) of clause (b) obliges the public authority to publish “the particulars of facilities available to citizens for obtaining information”. In the present case, the facility is made available - not just to citizens but to any person, for obtaining information from the ROC, under Section 610 of the Companies Act, and the Rules framed thereunder above referred to. Section 4(2) of the RTI Act itself postulates that in respect of information provided by the public authority suo moto, there should be minimum resort to use of the RTI Act to obtain information.

40. The submission of learned counsel for the respondent founded upon Section 22 of the RTI Act also has no merit. Section 22 of the RTI Act reads as follows:

22. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

41. Firstly, I may notice that I do not find anything inconsistent between the scheme provided under Section 610 of the Companies Act and the provisions of the RTI Act. Merely because a different charge is collected for providing information under Section 610 of the Companies Act than that prescribed as the fee for providing information under the RTI Act does not lead to an inconsistency in the provisions of these two enactments. Even otherwise, the provisions of the RTI Act would not override the provision contained in Section 610 of the Companies Act. Section 610 of the Companies Act is an earlier piece of legislation. The said provision was introduced in the Companies Act, 1956 at the time of its enactment in the year 1956 itself. On the other hand, the RTI Act is a much later enactment, enacted in the year 2005. The RTI Act is a general law/enactment which deals with the right of a citizen to access information available with a public authority,

subject to the conditions and limitations prescribed in the said Act. On the other hand, Section 610 of the Companies Act is a piece of special legislation, which deals specifically with the right of any person to inspect and obtain records i.e. information from the ROC. Therefore, the later general law cannot be read or understood to have abrogated the earlier special law.

42. The Supreme Court in *Ashoka Marketing Limited and Another Vs. Punjab National Bank and Others*, (1990) 4 SCC 406, applied and explained the legal maxim: *leges posteriores priores contrarias abrogant*, (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim: *generalalia specialibus non derogant*, (a general provision does not derogate from a special one). This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Benion: Statutory Interpretation p. 433-34). One of the principles of statutory interpretation is that the later law abrogates earlier contrary laws. This principle is subject to the exception embodied in the second latin maxim mentioned above. The Supreme Court in paragraphs 50-52 of this decision held as follows:

50. One such principle of statutory interpretation which is applied is contained in the latin maxim: *leges posteriores priores contrarias abrogant*, (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim: *generalalia specialibus non derogant*, (a general provision does not derogate from a special one). This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in an earlier

Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Benion: Statutory Interpretation p. 433-34).

51. The rationale of this rule is thus explained by this Court in the *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. The State of Uttar Pradesh & Others*, [1961] 3 SCR 185:

The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier directions should have effect.

52. In *U.P. State Electricity Board v. Hari Shankar Jain*, [1979] 1 SCR 355 this Court has observed:

In passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former special Act unless it appears that the special Act again received consideration from Parliament.

43. Justice G.P. Singh in his well-known work "Principles of Statutory Interpretation 12th Edition 2010" has dealt with the principles of interpretation applicable while examining the interplay between a prior special law and a later general law. While doing so, he quotes Lord Philimore from *Nicolle Vs. Nicolle*, (1922) 1 AC 284, where he observed:

it is a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases, of which the particular law

is but one. This, as a matter of jurisprudence, as understood in England, has been laid down in a great number of cases, whether the prior law be an express statute, or be the underlying common or customary law of the country. Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so.

44. The Supreme Court in *R.S. Raghunath Vs. State of Karnataka & Another*, (1992) 3 SCC 335, quotes from Maxwell on The Interpretation of Statutes, the following passage:

A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant, or, in other words, where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act.

45. This principle has been applied in *Maharaja Pratap Singh Bahadur Vs. Thakur Manmohan Dey & Others*, AIR 1996 SC 1931 as well. Therefore, Section 22 of the RTI Act, in any event, does not come in the way of application of Section 610 of the Companies Act, 1956.

46. Now, I turn to consider the submission of learned counsel for the petitioner that the Central Information Commissioner Sh. Shailesh Gandhi has acted with impropriety while passing the impugned order, by disregarding the

earlier orders of the other Central Information Commissioners and by taking a decision contrary to them without even referring the matter to a larger bench.

47. In *Sh. K. Lall Vs. Sh. M.K. Bagri*, Assistant Registrar of Companies & CPIO, F. No. CIC/AT/A/2007/00112, the Central Information Commissioner Sh. A.N. Tiwari squarely considered the very same issue with regard to the interplay between Section 610 of the Companies Act and the rights of a citizen to obtain information under the RTI Act. Sh. A.N. Tiwari by a detailed and considered decision held that information which can be accessed by resort to Section 610 of the Companies Act cannot be accessed by resort to the provisions of the RTI Act. The discussion found in his aforesaid order on this legal issue reads as follows:

9. It shall be interesting to examine this proposition. Section 2(j) of the RTI Act speaks of “the right to information accessible under this Act which is held by or under the control of any public authority.....”. The use of the words “accessible under this Act”; “held by” and “under the control of” are crucial in this regard. The inference from the text of this subsection and, especially the three expressions quoted above, is that an information to which a citizen will have a right should be shown to be a) an information which is accessible under the RTI Act and b) that it is held or is under the control of a certain public authority. This should mean that unless an information is exclusively held and controlled by a public authority, that information cannot be said to be an information accessible under the RTI Act. Inferentially it would mean that once a certain information is placed in the public domain accessible to the citizens either freely, or on payment of a pre-determined price, that information cannot be said to be “held” or “under the control of” the public authority and, thus would cease to be an information accessible under the RTI Act.

This interpretation is further strengthened by the provisions of the RTI Act in Sections 4(2), 4(3) and 4(4), which oblige the public authority to constantly endeavour “to take steps in accordance with the requirement of clause b of subsection 1 of the Section 4 to provide as much information suo-motu to the public at regular intervals through various means of communication including internet, so that the public have minimum resort to the use of this Act to obtain information.”(Section 4 sub-section 2). This Section further elaborates the position. It states that “All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.” The explanation to the subsection 4 section 4 goes on to further clarify that the word “disseminated” used in this Section would mean the medium of communicating the information to the public which include, among others, the internet or any other means including inspection of office of any public authority.

10. It is significant that the direction regarding dissemination of information through free or priced documents, or free or priced access to information stored on internet, electronic means, or held manually; free or on payment of predetermined cost for inspection of such documents or records held by public authorities, appear in a chapter on “obligations of public authorities”. The inference from these sections is a) it is the obligation of the public authorities to voluntarily disseminate information so that “the public have minimum resort to the use of this Act to obtain information”, b) once an information is voluntarily disseminated it

is excluded from the purview of the RTI Act and, to that extent, contributes to minimizing the resort to the use of this Act, c) there is no obligation cast on the public authority to disseminate all such information free of cost. The Act authorizes the public authorities to disclose such information suo-motu “at such cost of a medium or the print cost price as may be prescribed”, d) the RTI Act authorizes the public authority to price access to the information which it places in the public domain suo-motu.

11. These provisions are in consonance with the wording of the Section 2(j) which clearly demarcates the boundary between an information held or under the control of the public authority and, an information not so held, or under the control of that public authority who suo-motu places that information in public domain. It is only the former which shall be “accessible under this Act” ? viz. the RTI Act and, not the latter. This latter category of information forms the burden of sub-section 2, 3 and 4 of Section 4 of this Act.

12. The RTI Act very clearly sets the course for the evolution of the RTI regime, which is that less and less information should be progressively held by public authorities, which would be accessed under the RTI Act and more and more of such held information should be brought into the public domain suo-motu by such public authority. Once the information is brought into the public domain it is excluded from the purview of the RTI Act and, the right to access this category of information shall be on the basis of whether the public authority discloses it free, or at such cost of the medium or the print cost price “as may be prescribed”. The Act therefore vests in the public authority the power and the right to prescribe the mode of access to voluntarily disclosed information, i.e. either free or at a prescribed cost / price.

13. The respondents are right therefore in arguing that since they had placed in the

public domain a large part of the information requested by the appellant and prescribed the price of accessing that information either on the internet or through inspection of documents, the ground rules of accessing this information shall be determined by the decision of the public authority and not the RTI Act and the Rules. That is to say, such information shall not be covered by the provisions about fee and cost of supply of information as laid down in Section 7 of the RTI Act and the Rules thereof.

14. It is, therefore, my view that it should not only be the endeavour of every public authority, but its sacred duty, to suo-motu bring into public domain information held in its control. The public authority will have the power and the right to decide the price at which all such voluntarily disclosed information shall be allowed to be accessed.

15. There is one additional point which also needs to be considered in this matter. The appellant had brought up the issue of the overarching power of the RTI Act under Section 22. This Section of the Act states that the provisions of the Act shall have effect notwithstanding

anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. In his view, the pricing of the access to the records and information by the public authority at a scale different from the rates / fees for accessing the information prescribed under the Act amounts to inconsistency. A closer look at the provision shows that this is not so. As has been explained in the preceding paragraphs, the fees prescribed for access to information under the RTI Act applies only to information "held" or "under the control of the public authority. It does not apply inferentially to the information not held or not under the control of the public authority having been brought into the public domain suo-motu in terms of

sub-section 3 of Section 4. The price and the cost of access of information determined by the public authority applies to the latter category. As such, there is no inconsistency between the two provisions which are actually parallel and independent of each other. I therefore hold that no ground to annul the provision of pricing the information which the public authority in this case has done, exists.

16. In my considered view, therefore, the CPIO and the AA were acting in consonance with the provision of this Act when they called upon the appellant to access the information requested and not otherwise supplied to him by the CPIO, by paying the price / cost as determined by the public authority.

48. This view was followed by Sh. A.N. Tiwari in a subsequent order dated 29.08.2007 in "Shri Shriram (Dada) Tichkule Vs. Shri P.K. Galchor, Assistant Registrar of Companies & PIO". The same view was taken by another Central Information Commissioner namely, Prof. M.M. Ansari in his orders dated 29.03.2006 in Arun Verma Vs. Department of Company Affairs, Appeal No. 21/IC(A)/2006, and in the case of Sh. Sonal Amit Shah Vs. Registrar of Companies, Decision No. 2146/IC(A)/2008 dated 31.03.2008, and various others, copies of which have been placed on record. It appears that all these decisions were cited before learned Central Information Commissioner Sh. Shailesh Gandhi. In fact, in the impugned order, he also refers to these decisions and states that "I would respectfully beg to differ from this decision".

49. The Central Information Commission while functioning under the provisions of the RTI Act, no doubt, do not constitute a Court. However, there can be no doubt about the fact that Central Information Commission functions as a quasi-judicial authority, as he determines inter se rights and obligations of the parties in relation to the grant of information, which may entail civil and other consequences for the parties.

50. This Court in Union Public Service Commission Vs. Shiv Shambhu & Others, L.P.A. No. 313/2007 decided on 03.09.2008, while dealing with the issue whether the Central Information Commissioner should be impleaded as a party respondent in proceedings challenging its order and whether the Central Information Commission has a right of audience to defend its order before this Court in writ proceedings, observed as follows: 2. At the outset this Court directs the deletion of the CIC which has been arrayed as Respondent No. 1 to this appeal, consequent upon it being arrayed as such in the writ petition. This Court has repeatedly issued practice directions stressing that a judicial or quasi-judicial body or Tribunal whose order is challenged in a writ petition (and thereafter possibly in appeal) ought not to itself be impleaded as a party respondent. The only exception would be if malafides are alleged against any individual member of such authority or Tribunal in which case again it would be such member, and not the authority/Tribunal, who may be impleaded as a respondent. Accordingly the cause title of the present appeal will read as Union Public Service Commission v. Shiv Shambhu & Ors.”

51. This decision has subsequently been followed in State Bank of India Vs. Mohd. Shahjahan, W.P.(C.) No. 9810/2009, wherein the Court held as follows:

12. This Court is unable to accept the above submission. There is no question of making the CIC, whose order is under challenge in this writ petition, a party to this petition. Like any other quasi-judicial authority, the CIC is not expected to defend its own orders. Likewise, the CIC cannot be called upon to explain why it did not follow any of its earlier orders. That the CIC should not be made a party in such proceedings is settled by the judgment of the Division Bench in this Court in Union Public Service Commission v. Shiv Shambu 2008 IX (Del) 289.

52. It is, therefore, a well-recognised position that the CIC discharges quasi-judicial functions while deciding complaints/appeals preferred by one or the other party before it.

53. It is a well-settled canon of judicial discipline that a bench dealing with a matter respects an earlier decision rendered by a coordinate bench (i.e., a bench of same strength), and is bound by the decision of a larger bench. If this discipline is breached, the same would lead to complete chaos and confusion in the minds of the litigating public, as well as in the minds of others such as lawyers, other members/judges of quasi-judicial/judicial bodies, and the like. Breach of such discipline would result in discrimination and would shake the confidence of the consumers of justice. There can be no greater source of discomfiture to a litigant and his counsel, than to have to deal with diametrically opposite views of coordinate benches of the same judicial /quasi-judicial body. If the emergence of contradictory views is innocent i.e. due to ignorance of an earlier view, it is pardonable, but when such a situation is created consciously, with open eyes, and after having been put to notice, the judge/authority responsible for the later view should take the blame for creating confusion and for breaching judicial discipline.

54. The Supreme Court in Dr. **Vijay Laxmi Sadho Vs. Jagdish**, (2001) 2 SCC 247, deprecated such lack of judicial discipline by observing as follows:

33. As the learned Single Judge was not in agreement with the view expressed in Devilal's case, Election Petition No. 9 of 1980, it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well-settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of "different arguments"

or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs.

(emphasis supplied)

55. In the present case, the Central Information Commissioner Mr. Shailesh Gandhi has also demonstrated complete lack of judicial discipline while rendering the impugned decisions. By no stretch of imagination, it cannot be said that the earlier decisions were not on the point. Particularly, the decision rendered by Sh. A.N. Tiwari in F. CIC/T/A/2007/0012 dated 12.04.2007 directly deals with the very same issue, and is an exhaustive, and detailed and considered decision. If the Central Information Commissioner Sh. Shailesh Gandhi had a different view in the matter - which he was entitled to hold, judicial discipline demanded that he should have recorded his disagreement with the view of Sh. A.N. Tiwari, Central Information Commissioner, and, for reasons to be recorded by him, required the constitution of a larger bench to re-examine the issue. He could not have ridden rough shot over the earlier decisions of Sh. A.N. Tiwari and Prof. M.M. Ansari, particularly when he was sitting singly to consider the same issue of law.

56. The consequence of the improper conduct of Sh. Shailesh Gandhi, Central Information Commissioner, is that there are now two sets of conflicting orders- taking diametrically opposite views, on the issue aforesaid. Therefore, unless the said legal issue is settled one way or the other by a higher judicial forum, it would be open to any other Information Commissioner to choose to follow one or the other view. This would certainly lead to confusion and chaos. It would also lead to discrimination between

the querists/public authority, who are either seeking information or are defending the action under the RTI Act. One such instance, cited by learned counsel for the petitioner is in the case of Smt. Dayawati Vs. Office of Registrar of Companies, in CIC/SS/C/2011/000607 decided on 23.03.2012. In this case, once again the same issue had been raised. The Central Information Commissioner Smt. Sushma Singh has preferred to follow the view of Sh. A.N. Tiwari in the case of K. Lall Vs. Ministry of Company Affairs, Appeal No. CIC/AT/A/2007/00112 dated 14.04.2007.

57. On this short ground alone, the impugned orders of the learned Central Information Commissioner deserve to be quashed and set aside.

58. The reasoning adopted by Shri Shailesh Gandhi, the learned Central Information Commissioner for taking a view contrary to that taken by Sh. A.N. Tiwari in his order dated 12.04.2007 (which has been extracted hereinabove), does not appeal to me. The view taken by Sh. A.N. Tiwari, Central Information Commissioner appeals to this Court in preference to the view taken by Sh. Shailesh Gandhi, Central Information Commissioner in the impugned orders. The impugned orders do not discuss, analyse or interpret the expression- right to information, as defined in Section 2(j) of the RTI Act. They do not even address the aspect of Section 610 of the Companies Act being a special law as opposed to the RTI Act.

59. I may also observe that the approach of the Central Information Commission in seeking to invoke Section 20 of the RTI Act in the facts of the present case is wholly unjustified. By no stretch of imagination could it have been said that PIOs of the ROC had acted 'without any reasonable cause' or 'malafidely denied the request for information or knowingly gave incorrect, incomplete or misleading information, or destroyed information, which was the subject of the request, or obstructed in any manner the furnishing of information'. The

PIOs were guided by the departmental circular No. 1/2006 dated 24.01.2006 in the view that they communicate to the respondent-querist. This view was taken by none other than the Director Inspection & Investigation in the Ministry of Company Affairs, Government of India and circulated to all Regional Directors of Registrar of Companies and all Official Liquidators. There was nothing before the PIOs to suggest that the said view had been disproved by any judicial or quasi-judicial authority. Clearly, the PIOs acted bonafide and without any malice.

60. Even if it were to be assumed for the sake of argument, that the view taken by the learned Central Information Commissioner in the impugned order was correct, and that the PIOs were obliged to provide the information, which was otherwise retrievable by the querist by resort to Section 610 of the Companies Act, it could not be said that the information had been withheld malafide or deliberately without any reasonable cause. It can happen that the PIO may genuinely and bonafidely entertain the belief and hold the view that the information sought by the querist cannot be provided for one or the other reasons. Merely because the CIC eventually finds that the view taken by the PIO was not correct, it cannot automatically lead to issuance of a show-cause notice under

Section 20 of the RTI Act and the imposition of penalty. The legislature has cautiously provided that only in cases of malafides or unreasonable conduct, i.e., where the PIO, without reasonable cause refuses to receive the application, or provide the information, or knowingly gives incorrect, incomplete or misleading information or destroys the information, that the personal penalty on the PIO can be imposed. This was certainly not one such case. If the CIC starts imposing penalty on the PIOs in every other case, without any justification, it would instill a sense of constant apprehension in those functioning as PIOs in the public authorities, and would put undue pressure on them. They would not be able to fulfill their statutory duties under the RTI Act with an independent mind and with objectivity. Such consequences would not auger well for the future development and growth of the regime that the RTI Act seeks to bring in, and may lead to skewed and imbalanced decisions by the PIOs Appellate Authorities and the CIC. It may even lead to unreasonable and absurd orders and bring the institutions created by the RTI Act in disrepute. For all the aforesaid reasons, I allow the present petition and quash the impugned orders passed by Sh. Shailesh Gandhi, Central Information Commissioner. The parties are left to bear their respective costs.

IN THE HIGH COURT OF DELHI

W.P.(C) 12210/2009

Decided On: 16.01.2012

Appellants: **Northern Zone Railway Employees Co-Operative Thrift and Credit Society Ltd.**

Vs.

Respondent: **Central Registrar Cooperative Society and Ors.**

[Alongwith W.P.(C) 13550/2009]

Hon'ble Judges:

Hon'ble Mr. Justice Vipin Sanghi

Subject: Right to Information

JUDGMENT

Vipin Sanghi, J.

1. These are two petitions, preferred by the Northern Zone Railway Employees Co-operative Thrift and Credit Society Limited (in short 'NZRE'), to assail two orders, dated 15th June, 2009 (in W.P.(C) No. 12210/2009) and dated 22nd June, 2009 (in W.P.(C) 13550/2009) passed by the CIC, whereby the learned CIC has, inter alia, held that the petitioner is a 'public authority' within the meaning of Section 2(h) of the Right to Information Act, 2005 (in short 'RTI Act'), and on that basis, issued directions to the petitioner and imposed penalty on the petitioner.

2. The querists in these cases raised various queries relating to the petitioner, upon Northern Railway. In those proceedings, wherein the petitioner was not a party and was not noticed at all, the learned CIC has taken a view that the petitioner is a public authority. For this purpose, the CIC has relied upon an earlier order dated 14th July, 2008 passed in case no. CIC/OK/A/2008/00211 wherein also, the respondent/public authority before the CIC, was Northern Railway. In the said order dated 14th July, 2008 the CIC had observed as follows:-

.....During the hearing, the Respondents admitted that the NZRE was a Society of the Railway Employees and that deductions made from the employees salaries towards the payment of premium of LIC policies was sent to them. Moreover, the land on which the office of the NZRE was located was given to them by the Railways (this would amount to indirect funding) and the Railways issued free passes to the Members for attending the meetings. In fact, there was a close coordination between the NZRE and the Railway authorities. Under the circumstances, the Commission fails to understand as to how the NZRE can take a stand they were not a public authority - though they may function in an autonomous manner.

7. Accordingly, the Commission directs the NZRE to provide to the Applicant the information asked for. Infact, it seems strange that the NZRE should hold an LIC policy and not divulge its contents when the policy holder needs the detail thereof. If thereof, directs the NZRE to open up all the files and records regarding the LIC policy held by them of the employees concerned. This they should do by 5 August 2008.

3. It appears that this order was also passed by the CIC without notice to or hearing the petitioner.

4. The first submission of learned counsel for the petitioner is that the CIC should not have ruled on the status of the petitioner as

being a “public authority”, when the case of the petitioner was that it was not a “public authority” within the meaning of Section 2(h) of the RTI Act, without notice to, and granting hearing to the petitioner. I fully agree with this submission of the learned counsel for the petitioner, as an order, which has a bearing on the status, rights and obligations of a party qua the RTI Act, could not have been passed without even complying with the basic principles of natural justice, which are embedded and engrained in the RTI Act. On this short ground, the conclusion drawn by the learned CIC that the petitioner is a “public authority” within the meaning of Section 2(h) of the RTI Act cannot be sustained, and is liable to be set aside.

5. I would have considered remanding the case back to the CIC for determination of the said issue afresh after granting an opportunity to the petitioner and the other parties to put forward their case, but the parties have made detailed submissions on the said legal aspect before me. The submissions of the parties are premised on documents placed on record, and the said issue is a legal issue. I have heard them at length and, consequently, I proceed to consider the said submissions and decide the issue as to whether the petitioner is, or is not, a public authority.

6. The submission of Mr. Bhaduri is that the petitioner is a society which has been constituted with the object to promote the interests of all its members to attain their social and economic betterment through self help and mutual aid in accordance with the cooperative principles. The members of the petitioner association are employees of Northern Railway. The functions of the petitioner society, as set out in the petition are the following:-

(ii) Functions

The object of the Society shall be to promote the economic interest of the members. In furtherance of the above objects, the society may undertake any or all the following:

- (a) To raise funds by means of issuing shares, acceptance money on compulsory deposit or otherwise from members.
- (b) To lend money to share-holder at interest.
- (c) To undertake welfare activities particularly for the members and employees and their children for the promotion of their moral, educational and physical improvement.
- (d) To own lands, building or to take them on lease or rent for the business of the Society and residential quarters for the staff of the Society.
- (e) To open Branches within the area of operation of the society subject to the approval of the General Body.
- (f) To undertake other measures designed to encourage in the members the spirit and practice of thrift and mutual help.
- (g) To do all such things as are incidental or conducive to the attainment of any or all the above objects.
- (i) The Society shall help, maintain and promote the aims and object of the following funds, the rules of the working of which shall be framed by the General Body from time to time.
 - (1) The “Share holder Death Cum Retirement Benefit Funds”
 - (2) The “Share holder relief funds”.
 - (3) The “Staff Welfare Funds.”
 - (4) The “Building Fund.”
- (ii) Such other funds as may be considered necessary by the General Body from time to time,
- (h) To raise funds from the members through Saving Accounts and Fixed Deposits with the approval of General Body.

7. The petitioner has made a categorical averment that it does not receive any financial assistance or help from the government. The petitioner society is neither owned nor funded,

nor controlled by the State. It is also not the case of either of the parties that in the management of the petitioner society, the Railways have any direct or indirect role to play. On this basis, it is urged that the petitioner is not a “public authority” within the meaning of Section 2(h) of the RTI Act.

8. The petition is opposed by the respondents and, in particular, by the querist. Learned counsel for the querist Ms.Vibha Mahajan Seth submits that the members of the petitioner society are all Railway employees and deductions are directly made from their salaries, which are transmitted to the petitioner for being invested in LIC policies etc. She has also drawn the attention of the Court to Chapter XXIII of the Indian Railway Establishment Manual (Vol.-II) which deals with the aspect of Co-operative Societies. It is argued that Clause 425 of the said manual provides that special facilities shall be provided to cooperative societies by the Railway, which are categorized as (i) Consumer Co-operative Societies and (ii) Co-operative Credit Societies. Consumer Co-operative Societies are those which are engaged in retail trade to provide the needs of their members. She submits that the petitioner is a Co-operative Credit Society. Clause 2321 of the said manual provides for special casual leave and special passes to railway servants who are the members of the Managing Committee of such societies. In the case of Co-operative Credit Societies, special casual leave may be allowed as per actual requirement upto a maximum of 30 days in a calendar year. Under Clause 2323 it is provided that the co-operative societies shall adopt the model bye-laws framed by the Railway Board in consultation with the Registrar of Co-operative Societies concerned. The petitioner co-operative society is provided with premises by the Railways under Clause 2340, which provides that such societies shall be provided with accommodation on reasonable rent. The manner of fixation of such rent is also provided

under Clause 1960 of the said manual. It is argued that the Railways have, in fact, not recovered any rent at all from the petitioner society for the accommodation provided to it.

9. Ms. Vibha Mahajan Seth further submits that under Section 2 of the Multi-State Co-operative Societies Act, 2002, the said Act shall apply to, inter alia, all co-operative societies, with objects not confined to one State which were incorporated before the commencement of the said Act. She submits that the petitioner being a co-operative society with objects not confined to one State, the Multi State Co-operative Societies Act, 2002 is applicable to the petitioner society. It is argued that under Section 2(h) of the RTI Act a public authority means any authority or body or institution of self-government established or constituted, inter alia, “by any other law made by Parliament”.

10. She submits that there is no requirement of registration of a co-operative society under the Multi State Co-operative Societies Act, 2002 and by force of Section 2(a), the said Act is applicable to the petitioner society. Consequently, it can be said that the petitioner is a body which has been established or constituted by a law of Parliament and is, therefore, a public authority. She also places reliance on an order passed by the CIC in the case of Food Corporation of India Employees Co-operative Credit Society Limited in File No. CIC/PB/C/2007/00397/LS dated 18.03.2009 wherein the same view has been taken by the CIC.

11. She further submit that under Section 61 of the Multi State Co-operative Societies Act, 2002 the Central Government or the State Government, on receipt of a request from a Multi State Co-operative Society, with a view to promote co-operative movement, may subscribe to the share capital of a Multi-State Co-operative Society or give loans or make advances to the said society. Financial assistance in various other forms can also

be provided to a multi-state co-operative society.

12. The expression “public authority” is defined in Section 2(h) of the RTI Act as follows:

h) “public authority” means any authority or body or institution of self- government established or constituted-

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any-

(i) body owned, controlled or substantially financed;

(ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;

13. For an authority or body or institution to be classified as a public authority under clause (b) of Section 2(h), what is necessary is that the authority, body or institution is established or constituted by a law made by Parliament. Consciously, the Parliament has not used the expression “under any other law made by Parliament”. Therefore, the authority or body or institution should be created by, and come into existence by the statute framed by the Parliament, and not under the statute so framed. For example, a company is constituted under the Companies Act. It cannot be said that a company is constituted “by a law made by Parliament”. For it to be classified as an authority or body or institution under clause (b) or Section 2(h), it should be a statutory corporation.

14. Admittedly, the petitioner is not a statutory corporation as it is a cooperative society stated to have been constituted in the year 1960. It is not relevant whether it was constituted under the Cooperative Societies Act, 1912 or under any other law relating to any cooperative

society in force, or in pursuance of the Multi State Cooperative Societies Act, 1942 (MSCS Act) or not, since it is not in dispute that it is a cooperative society. All that Section 2(a) of the Multi State Cooperative Societies Act, 2002 purports to do, is to state to which class of cooperative societies the said act would “apply”. Section 2(b) states that the said Act “shall apply to” Multi-State Cooperative Societies “registered or deemed to be registered under this Act.....”[See Section 2(b)]

15. It is also not the case of the contesting respondents that the petitioner society receives any funds or financial aid from the Government. Even if the petitioner society is provided some facilities in the nature of accommodation on a reasonable rent or rent free accommodation, and its office bearers are provided casual leaves or special passes for travel on the railways to attend the affairs of the cooperative society, the same cannot be said to be a provision of “substantial finance” by the appropriate government, i.e. the Central Government to the petitioner cooperative society. Firstly, these facilities are provided to the office bearers, and not the petitioner society. Secondly, the respondents have not been able to show that the said facilities and amenities provided by the Central Government/Railways forms a significant fraction of the funds generated by the petitioner or the budget of the petitioner.

16. The petitioner is stated to be an organization of 72,000 railway employees, who contribute to the funds of the petitioner on a regular basis for being invested in schemes of LIC etc. There is no reason to accept that the amenities/facilities provided by the railways to the petitioner cooperative society translates into a “substantial finance” when compared to the revenues and budgets of the petitioner cooperative society. The method of collection of contributions is wholly irrelevant. That is only a mechanism evolved to enable smooth and punctual transmission of the subscription

of the railway employees. It has no bearing on the issue at hand.

17. It is not even shown that the model bye laws in any way vest the Central Government/ Railways with any direct or indirect control in the functioning, and in the organization of the petitioner cooperative society. The mere adoption of the model bye laws as prescribed by the railways is, therefore, of no consequence. The adoption of the model bye laws appears to be insisted upon, only to ensure that the funds entrusted to the petitioner cooperative society by its members is properly utilized and are not defaulted or dissipated.

18. The mere fact that the petitioner comes within the purview of MSCS Act also makes no difference to the status of the petitioner in relation to the RTI Act. If the submission of learned counsel for the respondents/querists were to be accepted, it would mean that every cooperative society to which the MSCS Act applies would, ipso facto, qualify as a public authority. This position cannot be accepted.

19. The enabling provision contained in Section 61 of the MSCS Act, which enables the Central and State Governments to provide aid to such multi state cooperative societies in one or the other way, specified in the said section by itself cannot lead to the inference that the petitioner is a public authority. For it to fall within the said definition, the respondent should have established that the Central Government or the State Government have, as a matter of fact, either subscribed to the share capital of the petitioner cooperative society; or given loans and made advances to the petitioner; or guaranteed repayment of principal and payment of interest on debentures issued by the petitioner society, or like, which amounts to "substantial finance".

20. Unless and until, the said aid qualifies to be termed as "substantial finance", when looked at in the light of the overall financial dealings and budget of the petitioner, the grant of aid

under Section 61 of the MSCS Act would not be sufficient to clothe the cooperative society with the character of a public authority.

21. The earlier decision of the CIC in the case of Food Corporation of India throws no light on the subject, as it does not disclose any reasons. In fact, the petitioner has pointed out that in various other cases, the CIC rejected the applications for disclosure of information, simply on the ground that the multi state cooperative society was not a public authority within the meaning of the RTI Act.

22. For all the aforesaid reasons, the finding returned by the learned CIC that the petitioner is a public authority is quashed, and it is held that the petitioner is not a public authority, in the light of the aforesaid discussion. However, in case the petitioner does receive substantial finance from the appropriate Government, or is otherwise controlled by the appropriate Government at any time in future, the said character may undergo a change.

23. As aforesaid, the queries were directed to, in all these cases, the Northern Railway. In respect of various queries, pertaining to which the Northern Railways itself had the information and should have provided the information, it forwarded the queries to the petitioner instead. Such conduct of the Northern Railway was not in accordance with the provisions of the RTI Act. For instance, it is for the Northern Railway to disclose as to how many passes it had issued to the officer bearers of the cooperative society in terms of its aforesaid manual. This information would be available with the Railways, as it pertains to the actions and conduct of the Railways. Similarly, it is for the Northern Railways to explain as to what action it has taken on the complaints made against the office bearers of the petitioner association, as the complaints were made to the Northern Railways and not to the petitioner, and the action was also required to be taken by the Northern Railways.

24. So far as the impugned orders direct disclosure of information by the Northern Railways, the same are sustained. The imposition of fine on the petitioner cannot be sustained, since it proceeds on the assumption that the petitioner is a public authority.

25. Accordingly, these petitions are disposed of with a direction that the matters be again placed before the learned CIC to decide the appeals afresh in the light of the aforesaid decision.

26. Let the parties appear before the learned CIC on 22.02.2012.

IN THE HIGH COURT OF DELHI

W.P.(C.) No. 5677/2011

Decided On: 22.11.2011

Appellants: **Jamia Millia Islamia**

Vs.

Respondent: **Sh. Ikramuddin**

Hon'ble Judges:

Honble Mr. Justice Vipin Sanghi

Subject: Right to Information

JUDGMENT

Vipin Sanghi, J.

1. The petitioner, Jamia Millia Islamia, a statutory public central institution regulated by Jamia Millia Islamia Act, 1988, assails the order dated 21.06.2011 passed by the Central Information Commission (in short referred to as CIC) in the respondents appeal No.CIC/SG/A/2010/001106, whereby the CIC has allowed the appeal preferred by the respondent and directed the Public Information Officer (PIO) of the petitioner to provide the complete information available as on record in relation to query No.1 of the respondent.

2. The respondent had sought information vide query No.1 as follows: Copies of Agreement/settlement between Jamia and Abdul Sattar S/o Abdul Latif & mania and Kammu Chaudhary in Ghaffar Manzil land. Two other queries were also raised, however, I am not concerned with them in this petition as the impugned order directs disclosure of information raised in query No.1 only, as aforesaid.

3. The PIO vide reply dated 18.03.2010 rejected the application of the respondent under the Right to Information Act, 2005 (the Act for short) by stating that the information sought

had no relationship to any public activity or interest and, as such, the same could not be disclosed under Section 8(1)(j) of the Act. The first appellate authority also affirmed the order of the PIO on the same grounds. The CIC, as aforesaid, has allowed the appeal insofar as query No.1 is concerned.

4. Before the CIC, the submission of the petitioner was, and even before me is, that the disclosure of the title documents of the petitioner/public authority/institution is exempted under Section 8(1)(j) of the Act. It was argued that the information sought by the respondent was an invasion of the privacy of the institution and had no relationship with any public activity or interest. It was argued that in case the title documents of the petitioner fall in wrong hands, it could be highly prejudicial to the cause of the petitioner-Institution, as there was a possibility that the said title documents may be misused.

5. On the other hand, the argument of the respondent herein was that since the petitioner is a University, it had no right to withhold the information about it.

6. The CIC held that to qualify for the exemption contained in Section 8(1)(j) of the Act, the information sought must satisfy the following criteria:-

The information sought must be personal in nature. Words in a law should normally be given the meanings given in common language.

In common language, we would ascribe the adjective personal to an attribute which applies to an individual and not to an Institution or a Corporate. From this, it flows that personal cannot be related to Institutions, Organisations or Corporates. Hence, Section 8(1)(j) of the RTI Act cannot be applied when the information concerns Institutions, Organisations or Corporates..

The phrase disclosure of which has no relationship to any public activity or interest means that the information must have been given in the course of a public activity. Various public authorities while performing their functions routinely ask for personal information from citizens, and this is clearly a public activity. Public activities would typically include situations wherein a person applies for a job, or gives information about himself to a public authority as an employee, or asks for a permission, license or authorization, or provides information in discharge of a statutory obligation..

The disclosure of the information would lead to unwarranted invasion of the privacy of the individual. The State has no right to invade the privacy of an individual. There are some extraordinary situations where the State may be allowed to invade the privacy of a citizen. In those circumstances special provisions of the law apply usually with certain safeguards. Therefore where the State routinely obtains information from citizens, this information is in relationship to a public activity and will not be an intrusion on privacy.

7. The CIC held that for exemption under Section 8(1)(j) of the Act to apply, the information sought must be personal in nature, that it must pertain to an individual and not an Institution/ Organization/Corporate. It was further held that whether the information sought had a relationship with any public activity or interest is not a consideration, while interpreting Section 8(1)(j) of the Act. Consequently, the

defence of the petitioner herein was rejected and the appeal was allowed.

8. The submission of Mr. Siddiqui, learned counsel for the petitioner, is that the petitioner a statutory body, is a juristic entity. It is a person in law. He relies on the meaning of the expression person as defined in the Blacks Law Dictionary which, inter alia, means an entity (such as a corporation) that is recognized by law as having the rights and duties of a human being.

9. He submits that Article 14 of the Constitution of India also uses the expression person and reads:

14. Equality before law.- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

He submits that the fundamental right guaranteed by Article 14 of the Constitution of India is available not only to an individual, that is a living person, but also to a juristic person. He also relies on Section 3(42) of the General Clauses Act which defines a person to include any company or association or body of individuals, whether incorporated or not.

10. He submits that the expression personal information used in Section 8(1)(j) of the Act means the information in relation to any person, whether an individual or a juristic entity. He submits that the CIC is wrong in its conclusion that personal information can only relate to an individual. He further submits that Clause (j) of Section 8(1) of the Act uses both expressions personal information and individual. He submits that this itself shows that the expression personal information has a wider connotation than information relating to an individual.

11. Mr. Siddiqui further submits that Section 8, which provides the exemptions from disclosure of information, begins with a non obstante clause by stating Not with standing

anything contained in this Act... Therefore, the exemptions contained in Section 8(1) of the Act override the right granted to a querist to seek information under Section 3 of the Act.

12. He submits that the disclosure of the information as allowed by the CIC can lead to serious consequences, inasmuch as, armed with the said information, the querist or any other person in whose hands the said information may fall, may misuse the same by resorting to forgery and fabrication.

13. On the other hand, the submission of learned counsel for the respondent is that the petitioner University, a statutory Corporation, is a public authority within the meaning of Section 2(h) of the Act. He submits that the CIC has only directed the disclosure of the copies of the Agreement/settlement arrived at between the petitioner and one Abdul Sattar in relation to Gaffar Manzil land. He submits that the petitioner being a public authority, every citizen is entitled to seek information in relation to its public activities and conduct. It is argued by the learned counsel for the respondent that under the Act, the rule is in favour of disclosure of information. He submits that even in relation to an individual, there is no absolute bar against disclosure of his personal information. The disclosure of personal information in relation to an individual could be withheld by the public authority only where the disclosure of the information is either not in relation to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual. However, even in such cases, the Central Public Information Officer (CPIO) or the State Public Information Officer (SPIO) or the appellate authority, on being satisfied, in larger public interest would disclose even such personal information.

14. I have given my due consideration to the issue raised. The preamble of the Act provides an aid to interpret clause (j) of Section 8(1) of

the Act. The preamble of the Act, inter alia, states:

An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, ..

And Whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And Whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And Whereas it is necessary to harmonise these conflicting interest while preserving the paramountcy of the democratic ideal.

15. The thrust of the legislation is to secure access of information under the control of public authorities in order to promote transparency and accountability in the working of every public authority. The access to information is considered vital to the functioning of a democracy, as it creates an informed citizenry. Transparency of information is considered vital to contain corruption and to hold Government and its instrumentalities accountable to the governed citizens of this country. No doubt, a person as legally defined includes a juristic person and, therefore, the petitioner is also a person in law. This is amply clear from the definition of the expression person contained in Section 3(42) of the General Clauses Act. That is how the expression is also understood in Article 14 of the Constitution of India.

16. However, in my view the expression personal information used in Section 8(1)(j) of the Act,

does not relate to information pertaining to the public authority to whom the query for disclosure of information is directed.

17. No public authority can claim that any information held by it is personal. There is nothing personal about any information, or thing held by a public authority in relation to itself. The expression personal information used in Section 8(1)(j) means information personal to any other person, that the public authority may hold. That other person may or may not be a juristic person, and may or may not be an individual. For instance, a public authority may, in connection with its functioning require any other person whether a juristic person or an individual, to provide information which may be personal to that person. It is that information, pertaining to that other person, which the public authority may refuse to disclose, if it satisfies the conditions set out in clause (j) of Section 8(1) of the Act, i.e., if such information has no relationship to any public activity or interest vis-a-vis the public authority, or which would cause unwarranted invasion of the privacy of the individual, under clause (j) of Section 8(1) of the Act. The use of the words invasion of the privacy of the individual instead of an individual shows that the legislative intent was to connect the expression personal information with individual. In the scheme of things as they exist, in my view, the expression individual has to be and understood as person, i.e., the juristic person as well as an individual.

18. The whole purpose of the Act is to bring about as much transparency, as possible, in relation to the activities and affairs of public authorities, that is, bodies or institutions of self governance established or constituted: by or under the Constitution; by any other law made by Parliament; by any other law may by State legislature; any body owned or controlled or substantially financed directly or indirectly by the funds provided by the appropriate Government; any non-government

organization substantially financed directly or indirectly by the funds provided by the appropriate Government; or any authority or body or institution constituted by a notification issued or by order made by the appropriate Government.

19. If the interpretation as suggested by the petitioner were to be adopted, it would completely destroy the very purpose of this Act, as every public authority would claim information relating to it and relating to its affairs as personal information and deny its disclosure. If the disclosure of the said information has no relationship to any public activity or interest.

20. Alternatively, even if, for the sake of argument it were to be accepted that a public authority may hold personal information in relation to itself, it cannot be said that the information that the petitioner has been called upon to disclose has no relationship to any public activity or interest.

21. The information directed to be disclosed by the CIC in its impugned order is the copies of the Agreement/settlement arrived at between the petitioner and one Abdul Sattar pertaining to Gaffar Manzil land. The petitioner University is a statutory body and a public authority. The act of entering into an agreement with any other person/entity by a public authority would be a public activity, and as it would involve giving or taking of consideration, which would entail involvement of public funds, the agreement would also involve public interest. Every citizen is entitled to know on what terms the Agreement/settlement has been reached by the petitioner public authority with any other entity or individual. The petitioner cannot be permitted to keep the said information under wraps.

22. In the light of the aforesaid discussion, I do not find any merit in this petition and dismiss the same as such.

IN THE HIGH COURT OF MADRAS

W.P. No. 14788 of 2011 and M.P. No. 1 of 2011

Decided On: 09.09.2011

Appellants: **S. Vijayalakshmi**

Vs.

Respondent: **Union of India, Rep. by its Secretary to Government, Ministry of Personnel, PG and Pensions, North Block, New Delhi and Director, Central Bureau of Investigation Lodhi Road, CGO Complex, New Delhi.**

Hon'ble Judges:

Honourable Mr. M.Y. Eqbal The Chief Justice
and Honourable Mr. Justice T.S. Sivagnanam

Subject: Right to Information

ORDER

Hon'ble M.Y. Eqbal Chief Justice and T.S. Sivagnanam, J.

1. By way of this Public Interest Litigation, the notification issued by the Government of India in G.S.R. No. 442E, dated 09.06.2011, including the Central Bureau of Investigation (CBI) within the ambit of the second schedule to the Right to Information Act, 2000 (RTI Act) has been questioned as being ultra vires Section 24 of the RTI Act and Article 14 of the Constitution of India.

2. According to the Petitioner, in the light of the various scams, the country has become rudderless in the war on corruption and at this juncture, the Government instead of becoming more transparent has become reactionary by resorting to Section 24 of the RTI Act by granting blanket exemption to the CBI. It is further contended that the Respondents overlooked the first proviso to Section 24(1) of the Act excluding information pertaining to allegations of corruption and human rights violation from being exempted under Section 24 of the Act. Further, Section 24 exempts only intelligence and security agencies and CBI is

an investigating agency cannot be granted a blanket exemption. Further, it is contended that the plea that investigative data require confidentiality has been adequately taken care in Section 8(1)(g) and (h) of the RTI Act. It is further contended that Section 24(3) of the Act mandates that every notification issued under Section 24(2) shall be laid before each house of Parliament, which failure renders the exemption null and void. It is the further case of the Petitioner that the exemption is bound to create a chaos as several writ petitions will be filed challenging the orders passed by the Central Information Commission in their decisions against the CBI, since the CIC has no power to set aside the notification.

3. The first Respondent has filed the counter affidavit inter alia contending that the exemption granted to CBI under Section 24 is not a blanket exemption inasmuch as it is subject to the provisos to Section 24 of the Act. The exemption was granted after the Government received the representation from CBI stating that difficulty were being faced by them in their working due to the queries raised under the RTI Act and such exemption was granted on the basis of the legal opinion received that CBI qualifies as a security and intelligence organisation under Section 24 of the Act. In the representation made by CBI, it was stated that cases handled by them are very sensitive in nature where inputs are based on intelligence collected which may relate to the

security of the State. It is further stated that collection of intelligence leads to registration of cases and then trial. In many sensitive cases the collection of intelligence and the process of investigation and trial are intertwined and cannot be separated. The list of important cases pertaining to National security dealt by CBI has been furnished. It was further submitted that intelligence plays a vital role in every aspect of the functioning of CBI. Many of the important and sensitive cases are registered on the basis of intelligence inputs, information with regard to modus operandi and sources, which are an essential part of investigation by CBI, are very important and any disclosure of such information may not only jeopardize the functioning of CBI in future investigations but also public safety and national security. It is further submitted that CBI represented it has developed its unique processes for functioning where each officer is given full freedom to express his/her views independently, this helps in bringing to the fore every facet of the issue under consideration, which helps in taking a balanced final decision in the matter. It was felt that disclosures under RTI may lead to targeting of officers which may ultimately affect the credibility of CBI which would not be in national interest. That CBI brought to the notice of the Government that entire investigation and trial of CBI cases is under close scrutiny of the courts and all relied upon documents are always made available to the accused. The CBI's proposal for exemption further merited acceptance because various other security agencies and police departments had been included in the Second Schedule to the RTI Act. It is further stated that the exemption has been granted bearing in mind the interest of the security of the State, which cannot be overlooked while protecting the right of the citizens to seek information. That the Right to Information is not an absolute right and there is a need to balance the right of the citizen against the need to ensure security of the Nation, which should not be

jeopardised due to disclosure of information which has security implications. That Section 24 of the RTI Act represents this balance, and the legislature has left the discretion with the Executive to assess which organisation possesses information, the disclosure of which may cause threat to the security of the State. It is further stated that the Court in exercise of its power of judicial review may examine whether the discretion has been exercised based on some material, but not the adequacy of the material which forms the basic of the decision. The first Respondent has further stated that the matter regarding inclusion of Central Public Authorities in the Second Schedule to the Act is exercised by the Central Government based on the recommendation of the Committee of a Secretary headed by the Cabinet Secretary and the matter was considered at length by the Government and it was felt that there was substance in the representation of CBI by virtue of the cases handled by them and the nature of its functioning and then a decision was taken to include CBI in the Second Schedule to the Act. That legal opinion was sought for and it was opined that CBI may be classified as Security and Intelligence Organisations for the purpose of Section 24 of the RTI Act.

4. The various allegations made in the affidavit filed in support of the writ petitions were denied in the counter affidavit. It is further stated that earlier during 2007, the request of CBI for inclusion in the Second Schedule was considered by the Government and when the matter was placed before the Committee of Secretaries, they expressed a view that CBI could resort to exemption under Section 8 of the RTI Act to deny disclosure of sensitive information. This view was accepted by the Government and it was not included in the Second Schedule. Subsequently, CBI again represented to the Government that in its experience since 2007, it had been found that the functioning of CBI was being affected due to various difficulties, due to exposure to queries

under the RTI Act; that due to the RTI Act, queries being posed on the officers of CBI were deterred from recording their views in the files fearlessly and independently and therefore legal opinion was obtained as to whether CBI was a Security and Intelligence Organisation. The legal opinion confirmed that in view of the nature and functions of CBI it could be included in the Second Schedule as a Intelligence and Security Organisation.

5. It is further stated that if a person wishes to make a complaint, the Office address and contact details of the Offices of CBI in each State are easily accessible on the website of CBI and the allegations made by the Petitioner are purely speculative. It is further stated that the Act does not provide that the impugned Notification would become operative only after it is laid before the Parliament, however, the Government would lay the Notification before both Houses of Parliament.

6. The CBI have filed a separate counter affidavit reiterating that the Right to Information as it is, with respect to other fundamental right recognized under Article 19(1) of the Constitution is not an unfettered right and subject to reasonable restrictions, on the ground of security of the State and Public Order etc. Ensuring the security of the State and Public Order are essential for the protection of democratical ideal of the country. The ever increasing degree of corruption in public life is a direct threat to maintenance of security of the State, Public Order and to the democratic State itself.

7. After setting out as to how the CBI was established, it is submitted that CBI has evolved as premier Investigating Agency of Government of India, which also investigates cases referred to by the State Governments, Constitutional Courts and cases reported from Union Territories and that the cases investigated/handled by CBI are of sensitive nature not only in terms of magnitude of corruption and economic crimes,

but also in terms of polity as whole and also at times having bearing on security of the country. The CBI investigates offences covering wide spectrum including complex terrorists claims and big financial frauds involving functions relating to intelligence collection and security of the country. It is further stated that CBI has investigated and is investigating extremely sensitive cases having Inter-State and Inter National ramifications which have a direct bearing on the National/Internal Security. That apart, CBI has been entrusted with the task of investigating cases which threaten the financial security of the Country.

8. After setting out in paragraph 9 of the counter affidavit the important and sensitive cases handled by CBI, it is submitted that intelligence plays a very vital role at every stage of investigation by the CBI and some of the leads provide information about conspiracy, modus operandi, motive etc. and those inputs obtained during information are further corroborated by collecting specific intelligence on the finding of the investigation leading to deduction of crime and identification and tracing of accused persons. Therefore, it is stated investigation and intelligence collections are inter twined activities. It is further stated that CBI has a inbuilt mechanism of transparency and accountability and documents which are relied on by the Agency in a case of prosecution, are given to the accused free of cost and there are several provisions in the Code of Criminal Procedure and the accused can summon any document/record etc. under Section 91 Code of Criminal Procedure. to defend himself. Further it is stated that CBI maintains and regularly updates its websites which contains information in public domain as envisaged under Section 4 of the RTI Act. It is further stated that the subject matters of most of the RTI applications dealt by CBI relate to ongoing investigation or under trial cases or discreet verifications/enquiries, the disclosure whereof under the RTI Act would be prejudicial to the investigation itself.

Though, exemptions have been provided under Section 8 of RTI Act against disclosure of information relating to under investigation and under trial cases, which would impede the process of investigations or apprehensions or prosecution of offenders, these provisions are not adequate to provide protection from disclosure of information having bearing on national security. It is further stated that the information pertaining to activities prior to registration of case and also post conclusion of investigation/trial is not protected under RTI Act and that most of such information has a direct bearing on security of the country and thus needs to be kept confidential. Further, it is contended that many a time, innocuous/unobjectionable pieces of information might seem harmless but when they are placed in conjunction with each other and some times with seemingly unconnected information the mosaic of a dangerous picture affecting the security of the nation can emerge.

9. The second Respondent further contend that the impugned notification was issued after appreciating and considering the proposals of CBI and after obtaining the opinion of the Attorney General of India and the Solicitor General of India and the Notification is not issued as reaction to any exposure, but, it is a well considered and reasoned decision after due consultation bearing in mind the interest of the security of the nation. It is further submitted that proviso to Section 24(1) of the RTI Act clearly mentions that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under the section. Therefore, the apprehension of the Petitioner that blanket exemption has been granted to CBI is not correct. In the counter affidavit the second Respondent has denied the various allegations made in the affidavit filed in the writ petition including the contentions raised in the grounds. With the above facts, the second Respondent prayed for dismissal of the writ petition.

10. We have heard Mr. Manikandan Vadhan Cherttiar, Learned Counsel for the Petitioner, Mr. Gaurav Banerji and Mr. M. Raveendran, learned Additional Solicitors General of India for the Respondents and perused the materials on record.

11. The issue which falls for consideration is as to whether the Government of India were justified in including CBI in the second schedule to the RTI Act thereby exempting CBI from the provisions of the RTI Act subject to the provisos contained in Section 24(1) of the RTI Act. Before we examine the provisions of the RTI Act, it would be useful to look into the enactment which occupied field prior to coming into force of the RTI Act.

12. Freedom of Information Act 2002, was enacted by the Parliament as an Act to provide for freedom to every citizen to secure access to information under the control of the Public Authorities, consistence with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto. This Act received the assent of the President on 6.1.2003. Section 2(d) of the Act defined information to mean any material in any form relating to the administration, operations or decisions of a public authority. Section 2(f) defined Public Authority to mean any authority or body established or constituted by or under the Constitution and by any law made by the appropriate Government and included any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government. Section 3 of the Act stated that subject to the provisions of the Act, all citizens shall have freedom of information. Section 4 dealt with obligation of public authorities, Section 8 regarding exemption from disclosure of information, Section 16 dealt with the organisations to which the Act shall not apply. Section 16(1) states, nothing contained in the said Act shall apply

to the Intelligence and Security Organisations specified in the schedule being organisations established by the Central Government or any information furnished by such organisation to that Government.

13. After a period of about two years, when the Freedom of Information of Act, 2002, was in force, the National Advisory Council deliberated on the issue to ensure greater and more effective access to information and that the 2002 Act, needs to be made more progressive, participatory and meaningful and the Council suggested certain important changes to be incorporated in the 2002 Act to ensure smoother and greater access to information. The Government examined the suggestions made by the National Advisory Council and Ors. and decided to make a number of changes in the law and decided to repeal the Freedom of Information Act 2002, and brought the Bill on the Right to Information Act, with the object that the proposed legislation will provide an effective frame work for effectuating the right of information recognised under Article 19 of the Constitution of India. The Bill contained 31 clauses of which Clause 24 dealt with exempting certain Intelligence and Security Organisations from the purview of the legislation, but information pertaining to allegation of corruption, shall, without prejudice to the exemption, be provided. This Bill after much deliberation was enacted as the Right to Information Act, 2005, (RTI Act) and received the assent of the President on 15.6.2005 and published in the Gazette of the India on 21.6.2005. The RTI Act was to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commission and for matters

connected therewith or incidental thereto. It further states that revelation of information in actual practice is likely to conflict with other public interest including efficient operation of the Governments, optimum use of limited physical resources and the preservation of confidentiality and sensitive information and it is necessary to harmonize these conflicting interest while preserving the paramoutcy of the democratic ideal. The RTI Act, is a concise enactment of 31 sections contained in 6 chapters. The First schedule deals with the form of oath or affirmation to be made by the Chief Information Commissioners and Ors. and the Second Schedule lists out the Intelligence and Security Organisations established by the Central Government.

14. Some of the relevant sections of RTI Act which we shall be dealing with in this order are re-produced hereunder for easy reference:

2. Definitions.-In this Act, unless the context otherwise requires,-

(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

(h) "public authority" means any authority or body or institution of self-government established or constituted-

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any-

(i) body owned, controlled or substantially financed;

- (ii) non-Government organisations substantially financed, directly or indirectly by funds provided by the appropriate Government;
 - (iii) "record" includes-
 - (a) any document, manuscript and file;
 - (b) any microfilm, microfiche and facsimile copy of a document;
 - (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and
 - (d) any other material produced by a computer or any other device;
 - (j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-
 - (i) inspection of work, documents, records;
 - (ii) taking notes, extracts or certified copies of documents or records;
 - (iii) taking certified samples of material;
 - (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;
3. Right to information.-Subject to the provisions of this Act, all citizens shall have the right to information.
4. Obligations of public authorities.-(1) Every public authority shall-
- (a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;
 - (b) publish within one hundred and twenty days from the enactment of this Act-
 - (i) the particulars of its organisation, functions and duties;
 - (ii) the powers and duties of its officers and employees;
 - (iii) the procedure followed in the decision-making process, including channels of supervision and accountability;
 - (iv) the norms set by it for the discharge of its functions;
 - (v) the rules, Regulations instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
 - (vi) a statement of the categories of documents that are held by it or under its control;
 - (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;
 - (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;
 - (ix) a directory of its officers and employees;
 - (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its Regulations;
 - (xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
 - (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

- (xiii) particulars of recipients of concessions, permits or authorisations granted by it;
- (xiv) details in respect of the information, available to or held by it, reduced in an electronic form;
- (xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
- (xvi) the names, designations and other particulars of the Public Information Officers;
- (xvii) such other information as may be prescribed;
- (f) information received in confidence from foreign Government;
- (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
- (h) information which would impede the process of investigation or apprehension or prosecution of offenders;
- (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;

8. Exemption from disclosure of information.-

(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

- (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
- (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
- (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
- (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
- (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

- (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the Appellate Authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with Sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of Clauses (a), (c) and (i) of Sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals

9. Grounds for rejection to access in certain cases.-Without prejudice to the provisions of Section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

24. Act not to apply to certain organisations.-(1) Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government:

Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this Sub-section: Provided further that in the case of (sic if) information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request.

(2) The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence

or security organisation established by that Government or omitting therefrom any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be, omitted from the Schedule.

(3) Every notification issued under Sub-section (2) shall be laid before each House of Parliament.

(4) Nothing contained in this Act shall apply to such intelligence and security organisation being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify:

Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this Sub-section: Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request.

(5) Every notification issued under Sub-section (4) shall be laid before the State Legislature..

15. The Learned Counsel appearing for the Petitioner submitted that intelligence aspect and investigations were covered under Section 8 of the Act and therefore, it is unnecessary for the Government to notify CBI, in the Second schedule to the Act thereby granting blanket exemption. It was further contended that if a citizen lodges a complaint and if he does not know the fate of his complaint, he could apply under the RTI Act and seek for information which right has now been denied to the citizen by virtue of the impugned Notification. Further it is contended that CBI is not an Intelligence

Organisation and therefore there is absolutely no justification for blanket exemption under Section 24 of the Act. From 2005, when the RTI Act came into force, the CBI have been enjoying the exemptions, under Section 8 of the Act as well as Section 10 of the Act and there is no justifiable reason to include CBI in the Second Schedule after a period of more than five years after the Act came into force.

16. Per contra the learned Additional Solicitors General would contend that the phrase Security and Intelligence Agency must be understood in the light of what is meant by the 'Security' in this context and Security refers to the Security of the State. It is further contended that this does not mean merely the Security of the entire country or the whole State and it is also not restricted to Armed Rebellion or Revolt.

17. Further from the information furnished it is seen that during 1941, the Government of India established an organisation known as the Special Police Establishment (SPE), which organisation was to investigate cases of bribery and corruption in transactions with the War and Supply Department of Government of India. During 1942, the activities of SPE were extended to investigate cases of corruption in Railways, as Railways were involved with movement and supply of War material. On 19.11.1946, the Delhi Special Police Establishment Act, Act 25 of 1946, came into force, which enabled the SPE to function in the provinces with the concurrence of the provisional Government for the purpose of investigating certain specific offences in which Central Government Employees were involved or Departments of the Government of India were concerned. The Ministry of Home affairs, Government of India, by Resolution dated 1.3.1963 established the CBI which is the successor organisation to the Delhi Special Police Establishment with an enlarged charter of functions.

18. In the counter affidavit filed by the Respondents, the sensitive cases handed by

CBI have been set out and it would be useful to refer to the list of cases handled by CBI which are stated to have a bearing on the National /internal security and on the financial and national security of the country viz. (i) Naval War Room Leak case (ii) Barak Anti Missile Defence System case (iii) Denel Anti Material Rifle case (iv) Fake Passport cases (vii) Assam Serial Bomb Blast cases (viii) Andaman Arms Haul case (ix) IC-814 Hijacking case (x) Rajiv Gandhi Assassination case (xi) Babri Masjid Demolition case, (xii) Fake Stamps/Stamp Paper Cases, (xiii) Fake Indian Currency Notes (FICNs) Cases, (xiv) Securities Scams (Harshad Mehta & Dalal Groups), (xv) Madhavpura Mercantile Co-operative Bank and erstwhile Global Bank Scams, (xvi) Satyam Corporate Fraud, (xvii) Illegal Mining Cases, (xviii) 2G Spectrum cases, etc.

19. From the list of cases, referred above, it cannot be denied that these cases are of very sensitive nature and may have a direct bearing on the national/ internal security apart from having direct bearing on the financial security of the country. The challenge to the impugned notification is primarily by contending that the Government was not justified in granting a blanket exemption to CBI under Section 24 of the RTI Act when for the past over five years, the CBI enjoyed the exemptions provided for under Section 8 of the Act.

20. As noticed above Section 8 deals with exemptions from disclosure of information and Section 8(1) enumerate the categories which are exempted from disclosure under the provisions of the RTI Act. The Petitioner relies on Section 8(1)(g) which states that information, the disclosure of which would endanger the life or physical safety of any person or identified the source of information or assistance given in confidence for law enforcement or security purposes and Section 8(1)(h) which states that information which would impede the process of investigation or apprehension or prosecution of offenders need not be disclosed.

21. Before we proceed further, it has to be borne in mind that the Second Schedule enumerated Intelligence and Security Organisations being Organisations established by the Central Government. The exemption under Section 24(1) was with regard to the organisations themselves and also with regard to any information furnished by such organisations to the Government. Therefore, there is a vital distinction between the exemption from disclosure of information contemplated under Section 8(1) of the Act to that of the exemption of the organisation themselves and the information furnished by them to the Government under Section 24(1) of the Act. Therefore, these two provisions are exclusive of each other and one cannot substitute for the other. Therefore, we are not persuaded to accept the submission of the Learned Counsel for the Petitioner that in view of the exemptions contemplated under Section 8(1) of the RTI Act there would be no necessity for a blanket exemption under Section 24(1) of the Act. This contention, in our view, is wholly misconceived.

22. Repeated reference has been made by stating that the exemption under Section 24(1) is a blanket exemption or in other words a whole sale exemption. In the preceding paragraphs we have reproduced Section 24 of the Act. In terms of Sub-section (1) of Section 24, nothing contained in the RTI Act shall apply to the Intelligence and Security organisation specified in the second schedule being organisations established by the Central Government or any information furnished by such organisations to that Government. As noticed above, first proviso to Section 24(1) of the Act states that information pertaining to the allegations of corruption and human right violation shall not be excluded under Section 24(1) of the Act. In terms of the second proviso, to Sub-section (1) of Section 24, that in case of information sought for is in

respect of allegations of violation of human right, the information shall only be provided after the approval of the Central Information Commission and notwithstanding anything contained in Section 7 (which deals with the disposal of requests), and such information shall be provided within 45 days from the date of receipt of request. Therefore, it can hardly be stated to be case of a whole sale exemption or a blanket exemption. If an RTI applicant comes with a query alleging corruption in any of the Agencies or Organisations, listed out in the Second Schedule to the RTI Act, such information sought for is bound to be provided and the protection under Section 24(1) cannot be availed of. Similar is the case relating to violation of human rights. Therefore, the safeguard is inbuilt in the Statute so as to ensure that even in respect of the Agencies or Organisations listed out in the Second Schedule are not totally excluded from the purview of the RTI Act.

23. Having held so, we come to the next question as to whether CBI qualifies for such exemption and as to whether they are an Intelligence and Security Organisation or one of them.

24. The learned Additional Solicitor General circulated to us the opinion offered by the learned Attorney General of India with reference to examination of the issue of inclusion of CBI and two other organisations, in the Second Schedule of the RTI Act. One of the queries raised is that "Would it be legally feasible to include the CBI in the Second Schedule of the RTI Act under the provisions of Section 24 of the Act ?"

25. The learned Attorney General after referring to the decisions of the Hon'ble Supreme Court opined as follows:

Applying the tests mentioned above, at this stage one may see the latest note received from the CBI setting out the grounds justifying the inclusion of the CBI in the Second Schedule.

In that note, it is stated that the CBI is the premier agency of the Central Government for prevention and investigation of offences covering a wide spectrum of offences. The CBI has now become involved in a wide range of cases, including cases referred at the instance of courts. These include cases where the economic security of the nation is at risk. A bench of 9 Judges, in *Attorney General for India v. Amratal Prajivandas*, MANU/SC/0774/1994 : (1994) 5 SCC 54, elucidated on the distinction between security of State, security of India, and economic security. Justice Jeevan Reddy, speaking for the Court, observed,

23..... In the modern world, the security of a State is ensured not so much by physical might but by economic strength-at any rate, by economic strength as much as by armed might.

(C) Having regard to the aforesaid and the vast number of cases that the CBI is presently involved with, it cannot be disputed that the CBI does intelligence work which is directly related to the security agencies. One need not emphasize any particular case, but the Mecca Masjid Blast case, the Bombay Blast cases of 1993, the Assam Serial Blast Cases, the Andaman Arms Haul Case, the IC-814 Hijacking Case and the Rajiv Gandhi Assassination case, to name a few, have a direct bearing on the security of the State. There is no doubt that the kind of cases which the CBI is concerned with and the impact of such cases directly affect the community. At this stage I may also point out that as observed by the Supreme Court in *Union of India v. Tulsiram Patel*, MANU/SC/0373/1985 : (1985) 3 SCC 398, there are various ways in which the security of the State can be affected. As per the majority opinion in the matter,

141..... Danger to the security of the State may arise from without or within the state. The expression "security of the State" does not mean security of the entire country or a whole State. It includes security of a part of the

State. It also cannot be confined to an armed rebellion or revolt. There are various ways in which security of the State can be affected. It can be affected by State secrets or information relating to defence production or similar matters being passed on to other countries, whether inimical or not to our country, or by secret links with terrorists.

(D) Justice Alagiriswamy, in *Giani Bakshish Singh v. Govt. of India* MANU/SC/0105/1973 : (1973) 2 SCC 688, stated that:

Defence of a country or the security of a country is not a static concept. The days are gone by when one had to worry about the security of a country or its defence only during war time. A country has to be in a perpetual state of preparedness. Eternal vigilance is the price of liberty.

(E) These words of the Supreme Court in 1973 have much more relevance and resonance in 2011. In the circumstances, my answer to the first question is in the affirmative.

26. Thus it is seen that the learned Attorney General was of the opinion that CBI does intelligence work and the cases dealt by them directly related to the security agencies. The learned Attorney General further opined that the Mecca Masjid Blast Case, Bombay Blast Cases of 1993, Assam Serial Blast cases, the Andaman Arms Haul case, IC 814 Hijacking case, and the Rajiv Gandhi Assassination case have a direct bearing on the security of the State. The contention raised by the Petitioner is that the CBI is not an intelligence and security organisation. After going through the encyclopedia and other like material, it is noticed that an intelligence agency is a Government Agency devoted for gathering information for purposes of National Security and Defence. The Agency may adopt various means for gathering information and assembly and propagation of this information is commonly known as intelligence analysis. An intelligence agency can provide varied services such as analysis relevant to the safety

and security of the nation, early deduction of impending crises etc. Security Intelligence pertains to national security threats such as terrorism, espionage etc. It is stated that CBI is a Government Agency that serves as a Criminal Agency Body, National Security Agency and Intelligence Agency with its motto “ Industry, Impartiality, Integrity”. The CBI is controlled by the Department of Personnel and Trainee in the Ministry of Personnel, Public Grievance and Pension of the Government of India. It is further stated that CBI is the official inter-pole unit of India. The CBI is stated to have handled the following broad category cases under several divisions such as Anti corruption division, Economic Crime Division and Special Crimes Division. The Anti Corruption Division is said to deal with case of corruption and fraud committed public servants of all Central Government Departments, public Sector Undertakings and Financial Institutions. The cases such as Bank frauds, Financial frauds, Foreign Exchange violations, large scale smuggling in Narcotics, Antiques etc. are being dealt with by the Economic Crimes Division. The Special Crimes Division deals with cases of terrorism, Bomb Blast etc. Thus it appears that cases which have inter station and internal ramifications involving various Governmental Agencies are being taken up by CBI as there is a need for a single agency to be in-charge of the investigation.

27. Prof. Lawrence W. Sherman, Wolfson, Professor of Criminology and Director of Police Executive Programme at Cambridge University while delivering a lecture on “Knowledge based Policing: India and the Global Revolution in Crime Prevention” dealt with the topic “Evidence and Knowledge” and observed as follows:

Such distinctions between evidence and knowledge will become increasingly important. Evidence is merely a set of facts, generally the most relevant facts available to help support a

decision. Knowledge is an integration of diverse facts and evidence, an arguably better basis for understanding and action than evidence alone. Knowledge must be based on evidence, but evidence in isolation is not enough. Knowledge also requires a theory that integrates the evidence, a broader context in which to apply the theory, and a conceptual map of how different aspects of actions are connected.

Police may, for example, have evidence that stop-and-search tactic reduce gun crime. But if such stops also foster community hostility to the police, that could reduce public willingness to help police make arrests and remove dangerous offenders from communities. Most police actions have multiple consequences. Experiments may only measure few of those consequences, one study at a time. Knowledge-based policing must integrate what we know and what we don't know, trying to find the best ways to deal with problems about which the evidence is rarely complete or reliable.

It is also worth contrasting knowledge-based policing with “intelligence-led” policing. There is a great value to having criminal tips, quantitative forecasting, and other ways of predicting where and when crime is most likely to occur. There are even major advances in such analysis that can enable police to predict who will commit the next murder. Such predictions, which could be described as intelligence, are just as central to evidence-based policing as the identification of hot spots or repeat problems.

The uses intelligence can best serve, however, cannot be derived from the intelligence itself. What action police should take when they produce such forecasts is a decision that requires a broad range of knowledge. Such knowledge must integrate law, history, culture, psychology, and sociology more generally in order to develop a plan of action that anticipates everything that can possibly go wrong, and takes as many steps as possible to avoid those possibilities.

28. The principle deducible from the above is that there is great value to having criminal tips, quantitative forecasting and other ways of predicting the crime and such predictions could be described as intelligence. From the long list of cases, which have been entrusted to CBI, it cannot be denied that intelligence-led approach has enabled CBI to make headway in the sensitive cases which have or had a direct bearing on the national and internal security. Therefore, we are convinced that the CBI could very well be termed as a intelligence agency of the Government of India. ‘

29. The next question would be whether it is a security organisation and whether it is both an intelligence and security organisation. The Hon’ble Supreme Court in *Ram Manohar Lohia v. State of Bihar* [1966 SC 740] while considering the scope of the phrase security of the State quoted the words of Subba Rao J, wherein his Lordships observed that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contra distinction to national upheavals, such a revolution, civil strife, war, affecting the security of the State. A more recent pronouncement of the Hon’ble Supreme in the case of *C. Anita and Sanjay Pratap Gupta*, which have been referred to by the learned Attorney General, it has been held that public order, law and order and the security of the state fictionally draw three concentric circles and it was held that every infraction of law must necessarily affect order but an Act affecting law and order may not necessarily also affect public order. Likewise an Act may affect public order but not necessarily the security of the State. Therefore, the test evolved by their Lordship was that it is not the kind, but the potentiality of the Act in question. In the light of the various sensitive cases which are being handled by CBI, it cannot be denied that they have a direct bearing not only the national security, but also the financial security of the country. As rightly contended the Security of

the State can be affected in various ways and there can be no exact or exhaustive definition and security threats may be varied both internal and external and the Security of the State can be affected in various ways which would include the corruption of the Government officials, unauthorized disclosure of State secrets, Economic offences to destabilise the National Economy, and therefore, intelligence gathering is an inseparable part of the work of a Security Agency. Thus it can be safely concluded that the security of the State is a very broad concept. Therefore we are convinced that CBI would qualify to be defined as a Security Organisation as well. Therefore, we find no error in the decision of the Government of India to include the CBI in the Second Schedule to the RTI Act.

30. An argument was advanced, that there was no necessity to include the CBI in the Second Schedule since for the past over five years, the CBI had taken umbrage under Section 8 of the Act. To examine this question it would be necessary to look into the relevant provisions of the RTI Act which we have reproduced in the earlier part of this order. As noticed above, the Act was enacted to provide for setting out the practical regime of Right to information for citizen to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. The preamble further states that revelation of information in actual practice is likely to conflict with other public interest including efficient operation of Government, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. In the preamble it is further stated that it is necessary to harmonize these conflicting interest while preserving the paramountcy of democratic ideal. Therefore, the law makers were conscious of the fact that in actual practice while revealing information, there is a likelihood of conflict with other public interest which includes preservation of confidentiality of sensitive information.

Therefore, a need was felt to harmonize this conflict and at the same time preserve the democratic ideal which is paramount.

31. If we look into Section 3 of the RTI Act, it states that subject to the provision of the Act, all citizens shall have the right to information. Therefore, it cannot be stated that the right is a absolute and unfettered right but such right is subject to the provisions of the RTI Act. Section 8 of the Act deals with exemptions from disclosure of information. In a recent decision of the Hon'ble Supreme Court in *Central Board of Secondary Education v. Aditya Bandopadhyay*, [MANU/SC/0932/2011 : 2011 (8) SCALE 645], dealt with an issue in which the Respondent therein appeared for secondary school examination conducted by the Appellant CBSE. On receiving the mark sheet, he was disappointed to see the marks awarded and therefore, made an application for inspection and re-evaluation of the answer book. This request was rejected by the CBSE, which was challenged before the Calcutta High Court. CBSE took umbrage Section 8(1)(e) of the RTI Act and further contended that the request was contrary to their Regulations. A Division Bench of the Calcutta High Court which dealt with the matter, directed CBSE to grant inspection of the Answer Book and rejected the prayer for re-evaluation. Challenging the said order, CBSE approached the Hon'ble Supreme Court.

32. Various questions were considered by their Lordships and for the purpose of this case, it would be relevant to take note of the law stated, more particularly on the aspect regarding Section 8 of the Act, as well as the nature of right conferred on a citizen under the RTI Act. Their Lordships has held as follows:

33. Some High Courts have held that Section 8 of RTI Act is in the nature of an exception to Section 3 which empowers the citizens with the right to information, which is a derivative from the freedom of speech; and that therefore Section 8 should be construed strictly,

literally and narrowly. This may not be the correct approach. The Act seeks to bring about a balance between two conflicting interests, as harmony between them is essential for preserving democracy. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The preamble to the Act specifically states that the object of the Act is to harmonise these two conflicting interests. While Sections 3 and 4 seek to achieve the first objective, Sections 8, 9, 10 and 11 seek to achieve the second objective. Therefore when Section 8 exempts certain information from being disclosed, it should not be considered to be a fetter on the right to information, but as an equally important provision protecting other public interests essential for the fulfilment and preservation of democratic ideals.

34. When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualise and enumerate all types of information which require to be exempted from disclosure in public interest. The legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act that is Section 8 of Freedom of Information Act, 2002. The Courts and Information Commissions enforcing the provisions of RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonises the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.

35. At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information that is available and existing. This is clear from a combined reading of Section 3 and the definitions of 'information' and 'right to information' under Clauses (f) and (j) of Section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in Section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or Regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant. The reference to 'opinion' or 'advice' in the definition of 'information' in Section 2(f) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act.

36....

37. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under Clause

(b) of Section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information, (that is information other than those enumerated in Section 4(1)(b) and (c) of the Act), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.). Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties.

33. Their Lordships held that the Act seeks to bring about a balance between two conflicting interest as harmony between them is essential for preserving democracy. After taking note of the preamble to the Act, their Lordships observed that Sections 3 and 4 seeks to achieve the first objective i.e. to bring about

transparency and accountability and Sections 8, 9, 10 and 11 to achieve the second objective viz. to ensure that revelation of information does not conflict with other public interest which include preservation of confidentiality of sensitive information. Therefore it was held that Section 8 should not be considered to be fetter on the right to information, but as an equally important provision protecting other public interest essential for the fulfillment and preservation of democratic ideals. Their Lordships also cleared the misconception about the RTI Act, and held that the RTI Act provides access to all information that is available and existing, subject to the exemptions in Section 8 of the Act.

34. It has been further held that the provisions of the RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under Clause (b) of Section 4(1) of the RTI Act, which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. In respect of information other than those enumerated in Section 4(1)(b) & (c) of the Act, equal importance are given to other public interest like confidentiality and sensitive information. Further, that indiscriminate and impracticable demands for disclosure of all and sundry information could be counter productive as it will adversely affect the efficiency of the administration, and result in the executive getting bogged down with non productive work of collecting and furnishing information. Their Lordships have also sent a warning by observing that the Act should not be allowed to be misused or abused to become a tool to obstruct the national development and integration or to destroy the peace, tranquility and harmony among its citizens, or it should be converted into a tool of oppression of honest officials striving to do their duty. The learned Additional Solicitor General appearing for the India submitted that 90% of queries are from

the accused themselves and if such sensitive information is furnished, it would seriously hamper and jeopardize the investigation. As we are informed that in the manner of functioning of CBI, the Officers concerned are required to record their independent opinion in the files during the course of gathering intelligence or during investigation and if RTI queries are made by the accused themselves or on their behalf, by any third party applicant, it would prevent the officers from freely recording their opinion. In our view, queries raised which would hamper or jeopardize the working of any intelligence and security agency should not be permitted and undoubtedly this was not the purport and intent of the RTI Act, as the preamble itself clearly states that it is necessary to harmonize the conflicting interest while preserving the paramountcy of the democratic ideal. Any investigation by such an Agency like CBI handling sensitive and sensational cases involving the internal security of the country and its financial stability, if allowed to be disclosed would be counter productive and it will adversely affect the efficiency of the functioning of the organisation itself. Undoubtedly, intelligence and security of the Government or any of its establishments has a definite linkage to the intelligence which is gathered and therefore, they appear to be inseparable.

35. Indisputably, CBI is dealing with so many cases of larger public interest and the disclosure of information shall have great impact not only within the country but abroad also, and it will jeopardise its works. Equally, the investigations done by CBI have a major impact on the political and economic life of the nation. There are sensitive cases being handled by the CBI which have direct nexus with the security of the nation. Once jurisdiction is conferred upon the CBI under Section - 3 of the Act by notification made by the Central Government, the power of investigation should be governed by the statutory provisions, and cannot be interfered

with or stopped or curtailed by any executive instructions, and shall not be subjected to any executive control.

36. In the case of Vineet Narain v. Union of India reported in MANU/SC/0827/1998 : (1998) 1 SCC 226 the Supreme Court observed as follows:

39. There can be no doubt that the overall administration of the said force, i.e., CBI vests in the Central Government, which also includes, by virtue of Section 3, the power to specify the offences or class of offences which are to be investigated by it. The general superintendence over the functioning of the Department and specification of the offences which are to be investigated by the agency is not the same as and would not include within it the control of the initiation and the actual process of investigation, i.e., direction. Once the CBI is empowered to investigate an offence generally by its specification under Section 3, the process of investigation, including its initiation, is to be governed by the statutory provisions which provide for the initiation and manner of investigation of the offence. This is not an area which can be included within the meaning of “superintendence” in Section 4(1).

40. It is, therefore, the notification made by the Central Government under Section 3 which confers and determines the jurisdiction of the CBI to investigate an offence; and once that jurisdiction is attracted by virtue of the notification under Section 3, the actual investigation is to be governed by the statutory provisions under the general law applicable to such investigations. This appears to us the proper construction of Section 4(1) in the context, and it is in harmony with the scheme of the Act, and Section 3 in particular. The word “superintendence” in Section 4(1) cannot be construed in a wider sense to permit supervision of the actual investigation of an offence by the CBI contrary to the manner provided by the statutory provisions. The broad proposition

urged on behalf of the Union of India that it can issue any directive to the CBI to curtail or inhibit its jurisdiction to investigate an offence specified in the notification issued under Section 3 by a directive under Section 4(1) of the Act cannot be accepted. The jurisdiction of the CBI to investigate an offence is to be determined with reference to the notification issued under Section 3 and not by any separate order not having that character

42. Once the jurisdiction is conferred on the CBI to investigate an offence by virtue of notification under Section 3 of the Act, the powers of investigation are governed by the statutory provisions and they cannot be estopped or curtailed by any executive instruction issued under Section 4(1) thereof. This result follows from the fact that conferment of jurisdiction is under Section 3 of the Act and exercise of powers of investigation is by virtue of the statutory provisions governing investigation of offences. It is settled that statutory jurisdiction cannot be subject to executive control.

37. The apprehension that the CBI by virtue of its inclusion in the Second Schedule has got a blanket exemption, cannot be countenanced for the simple reason that what has been contemplated under Section 24 is no such blanket exemption. The Act was intended among other things to contain corruption and to hold Governments and their Instrumentalities accountable to the Government. This purpose and intent of the Act is sufficiently provided for in the two provisos to Section 24(1) of the Act. The information pertaining to allegation of corruption and human rights violation are not excluded under Sub-section (1) of Section 24. Therefore, the exemption by virtue of inclusion of CBI in the Second Schedule to a RTI Act is not a wholesale or a blanket exemption as contended by the Petitioner. After taking note of the facts placed before this Court and the law discussed above, it cannot be stated that every Police Thana is an intelligence Agency

and should be treated on par with the CBI for the benefit of the exemption under Section 24 of the Act.

38. The Government of Tamil Nadu by a Government Order in G.O. Ms. No. 158, Personnel and Administrative Reforms Department dated 26.8.2008, in exercise of its powers under Section 24(4) of the RTI Act ordered that the Act shall not apply to two organisations viz. Tamil Nadu State Vigilance Commission and Directorate of Vigilance and Anti Corruption. The said Government Order was challenged before this Court in a public interest writ petition in W.P. No. 4907 of 2009 and was heard by the Hon'ble First Bench of this Court presided over by the then Hon'ble Chief, Hon'ble Mr. Justice H.L. Gokhale. In the said Writ Petition it was contended that to qualify for exemption under Section 24(4), such organisation must be both intelligence as well as Security Organisations. The Hon'ble First Bench after analysing the language employed in Sub-section (4) of Section 24 by judgment dated 30.3.2009, held thus:

5. As can be seen from the language used in the main part of Sub-Section 4, it states that nothing contained in this Act shall apply to such intelligence and security organisation. Thus, in the first part, two entities are mentioned in singular as organisation. Subsequently, they are referred as 'organisations' established by the State Government. If intelligence and security organisation was only one, there was no need to use the plural term 'organisations' subsequently. It clearly indicates that such an organisation can be for intelligence purpose or for security purpose. The word "and" between the two words intelligence and security organisation will have to be read as "or". Therefore, the second submission of Mr. Radhakrishnan cannot be accepted.

39. Yet another contention was raised before the Hon'ble Division Bench that the said provision affects the fundamental rights envisaged

under Article 19(1)(a) of the Constitution of India. While considering the said question, the Hon'ble Division Bench held as follows:

6....It is material to note that sub Clause 2 of Article 19 of the Constitution of India provides that any such law insofar as it imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of [the sovereignty and integrity of India], particularly the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence, its operation will not be affected by sub-clause 1(a). In our view, Section 24(4) of the Act provides for reasonable restriction in the interest of public order.

40. Ultimately the Hon'ble Division Bench after going through the reasons assigned by the State Government, seeking to justify their decision under Section 24(4), held that confidentiality and secrecy in certain cases are required to be maintained right from the initial stage upto filing of charge sheet on the one hand and upto issue of final orders in the case of disciplinary proceedings. In vigilance cases, giving information at the initial stage, investigation stage and even prosecution stage would lead to unnecessary embarrassment and would definitely hamper due process of investigation. Thus it was held that the State Government has given sufficient reasons as to why it was exercising power under Section 24(4) of the Act and this exercise of discretionary power is also protected under Article 19(2) of the Constitution as it is a reasonable restriction in the interest of public order. The findings rendered by the Hon'ble Division Bench would apply with full force to the case on hand also.

41. At this stage, it would be useful to examine the reasons assigned by the Union Government to justify their action by exercising its power under Section 24(1) of the Act. Reference may be made in this regard to certain averments

made in the counter affidavit filed by the first Respondent.

6...It is further stated that collection of intelligence leads to registration of cases and then final. In many sensitive cases the collection of intelligence and the process of investigation and trial are intertwined and cannot be separated.

7. It is further stated that some of the important cases pertaining to national security that have been, or are being dealt with, by the CBI are as follows:

- a) Naval War Room Leak case
- b) Barak Anti-Missile Defence System case
- c) Denel Anti-Material Rifle case
- d) Mecca-Masjid Blast Case
- e) Bombay Blast Cases of 1993
- f) Fake Passport cases
- g) Assam Serial Bomb Blast cases
- h) Andaman Arms Haul case
- i) IC-814 Hijacking case
- j) Rajiv Gandhi Assassination case
- k) Fake Currency and fake stamp paper scam cases
- l) Securities scam cases.

8. It was further submitted by the CBI that intelligence plays a vital role in every aspect of the functioning of CBI. Many of the important and sensitive cases are registered on the basis of intelligence inputs. Information with regard to modus operandi and sources, which are an essential part of investigation by CBI, are very important and any disclosure of such information may not only jeopardize the functioning of CBI in future investigations but also public safety and national security.

9. CBI further submitted that it has developed its unique processes for functioning where each officer is given full freedom to express

his/her views independently. This helps in bringing to the fore every facet of the issue under consideration, which helps in taking a balanced final decision in the matter. It was felt that disclosures under RTI may lead to targeting of officers which may ultimately affect the credibility of CBI which would not be in national interest. CBI further submitted that entire investigation and trial of CBI cases is under close scrutiny of the courts and all relied upon documents are always made available to the accused. The CBI's proposal for exemption further merited acceptance because various other security agencies and police departments had been included in the Second Schedule to the RTI Act....

21...it has been found that the functioning of CBI was being affected due to various difficulties due to exposure to queries under the RTI Act. It was stated that due to RTI queries being posed, the officers of CBI would be deterred from recording their views on the files fearlessly and independently. In view of the fact that CBI handles cases affecting national security, legal opinion was obtained on the issue of whether CBI was a security and intelligence organisation and could be included in the 2nd Schedule to the RTI Act. The legal opinion confirmed that in view of the nature and functions of the CBI, it could be included in the 2nd Schedule as a security and intelligence organisation. The matter was thereafter considered by the Committee of Secretaries which recommended for inclusion of CBI in the 2nd Schedule of the RTI Act. Thereafter a decision was taken by the competent authority and a notification was issued in exercise of powers under Section 24 of the RTI Act.

Thus from the averments referred to above, the matter was considered at all levels before a decision was arrived at and after analysing the materials placed by the CBI, the Union Government held that CBI was a security and intelligence organisation.

42. We find no justifiable reasons to depart from such findings which appears to have been arrived at after considering all materials placed before the Government, taken note of by the Committee of Secretaries and other authorities prior to issuance of the impugned Notification. Admittedly there is no allegation with regard to the decision making process or that there was any arbitrariness in the procedure adopted so as to offend Article 14 of the Constitution. It is submitted by the learned Additional Solicitor

General appearing for the first Respondent that Notification has been placed before both Houses of Parliament and would be taken up for consideration in the ensuing Session.

43. In view of the above, we hold that the impugned Notification is neither ultra vires Section 24 of the RTI Act nor violative of the provisions of the Constitution of India.

44. In the result the Writ Petition fails and the same is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

IN THE HIGH COURT OF MADRAS

W.P. Nos. 27665, 27666 of 2010 and W.P. No. 12325 of 2011 and Connected M. Ps. W.P. Nos. 27665 & 27666 of 2010

Decided On: 25.11.2011

Appellants: **V. Madhav, S/o. V.D.S. Prasad, 31/IV, Maan Sarovar Raaja Apartments, 11-A, Arcot Road, Porur, Chennai 600 116 and Siva Elango, S/o. P.R. Sivanathan, Makkal Sakthi Katchi, 41, Bazaar Lane, Saidapet, Chennai 600 014**
Vs.

Respondent: **The Government of Tamil Nadu, Rep. by its Secretary, Personnel & Administrative Reforms, Fort St. George, Chennai, The Tamil Nadu State Information Commission, Rep. by its Secretary, Chennai, The Tamil Nadu State Information Commission, Rep. by its Secretary, Chennai 600 018. and K.S.Sripathi, I.A.S., (retd.), 1085, Anna Nagar, West Extension, Chennai 600 101**

AND

Appellants: **S. Vijayalakshmi, Advocate, 2/1, 1st Main Road, Ashoka Avenue, Periyar Nagar, Chennai 82**
Vs.

Respondent: **State of Tamil Nadu, Rep. by its Secretary to Government, P & AR Department, Secretariat, Beach Road, Chennai and Ors.**

Hon'ble Judges:

Hon'ble Mr. M.Y. Eqbal, Chief Justice and The
Hon'ble Mr. Justice T.S. Sivagnanam

ORDER

**Hon'ble Chief Justice &
T.S. Sivagnanam, J.**

1. W.P. No. 27665 of 2010 has been filed challenging the appointment of the 3rd respondent therein as the State Chief Information Commissioner as unconstitutional, illegal and violative of Section 15(3) of the Right to Information Act, 2005.

2. W.P. No. 27666 of 2010 has been filed for the issuance of a Writ of Quo Warranto calling upon the 3rd respondent therein to show cause under what authority he holds the position

of the State Chief Information Commissioner, Tamil Nadu.

3. W.P. No. 12325 of 2011 has been filed for the issuance of a Writ of Certiorari to quash G.O.Ms.Nos.77 and 124 dated 17.04.2008 and 01.09.2010 respectively issued by the P&AR Department appointing respondents 3 to 6 therein as Commissioners in the Tamil Nadu State Information Commission as being arbitrary and violative of Section 15(3) of RTI Act, 2005.

4. At the very outset, we are of the view that insofar as G.O.Ms.No.77 dated 17.04.2008, which has been challenged in W.P. No. 12325 of 2011 is concerned, it is a highly belated one, inasmuch as appointments of State Information Commissioners were made as far back as 17.04.2008 and the same is challenged now in the year 2011. Moreover, one of the

respondents in the said writ petition viz., the 5th respondent, who has been appointed as Information Commissioner by the said G.O.Ms. No.77 dated 17.04.2008 has already retired on 23.07.2011. Hence, W.P. No. 12325 of 2011 shall be confined only challenge to G.O.Ms.No.124 dated 01.09.2010 by which respondent ' 6 therein was appointed as the Chief Information Commissioner.

5. Since in all these three writ petitions the appointment of 3rd/6th respondent as Chief Information Commissioner has been challenged and common questions of law and facts are involved, they are disposed of by this common order.

6. In W.P. Nos. 27655 and 27666 of 2010 though separate prayers have been made, to quash the appointment of the 3rd respondent and for the issuance of a Writ of Quo Warranto against the 3rd respondent, yet the grounds raised are common and essentially the challenge is to the appointment of 3rd respondent as Chief Information Commissioner on the ground, inter alia, that the said appointment is at variance with the spirit of the Right to Information Act, 2005 (for short 'Act') and it is violative of constitutional mandates and principles of natural justice. It is further stated that Section 15(3) of the Act simply states that the appointment of State Information Commissioner would be by a Committee, and it does not provide for any guidelines to be followed in the matter of appointment of State Information Commissioner. Therefore, the appointment of the 3rd respondent as the Chief Information Commissioner without framing guidelines by way of rules or governmental order is arbitrary and illegal. It is further stated that in the absence of such rules or guidelines the government must have followed the rules applicable to appointment of a comparable post. It is further stated that the Leader of the Opposition was not even provided with the names of probable candidates before convening the meeting of

the Selection Committee, and this violates the mandate provided under Section 15(3) of the Act, which clearly states that the appointment of Chief Information Commissioner must be in consonance with every known concept of transparency and openness, and therefore, the entire process of selection was grossly illegal and void. The appointment of 3rd respondent as the Chief Information Commissioner without the consent of the Leader of the Opposition is clearly illegal. Since, the government does not notify the vacancies and call for the applications from the interested eligible candidates, the entire selection process violates Articles 14 and 16 of the Constitution, and therefore, it deserves to be set aside. Finally, it is stated that the selection of the 3rd respondent is a pre-determined and pre-conceived one, against the avowed object of transparency in the selection of such important post, and therefore, requires to be quashed.

7. In W.P. No. 12325 of 2011 the grounds of challenge to the appointment of 6th respondent therein as the Chief Information Commissioner are that the recommendation of the Leader of the Opposition was not obtained for the said appointment, and the Leader of the Opposition was intentionally sidelined in the consultation process. The 6th respondent is a handpicked candidate of the political establishment in order to insulate the incriminating records of the then government. It is further contended that in the State Information Commission quasi judicial orders are being passed daily by the incompetent Commissioners without following the rules of natural justice.

8. In W.P. Nos. 27665 and 27666 of 2010 the respondents 2 and 3 namely, the State Information Commission and the Chief Information Commissioner filed a common counter affidavit stating inter alia that the appointment of the 3rd respondent as Chief Information Commissioner is valid, and it was made strictly in accordance with the provisions

of the Act, and it cannot be termed as arbitrary and unconstitutional. It is further stated that a valid selection Committee, consisting of the Chief Minister, the Leader of the Opposition and a Cabinet Minister was constituted, as required under Section 15(3) of the Act, to recommend the name for the State Chief Information Commissioner, and its meeting was also held on 23.08.2010. In the said meeting, 2/3rd majority, viz., the Chief Minister and the Cabinet Minister, decided to recommend the name of the 3rd respondent as the Chief Information Commissioner. Accordingly, after obtaining the consent of the Governor, a notification in G.O.Ms.No.124, Personnel and Administrative Reforms (AR.3) Department, dated 01.09.2010 was issued appointing the 3rd respondent as the Chief Information Commissioner. Therefore, it is a proper and valid appointment in consonance with Section 15(3) of the Act. It is further stated that the absence of a Committee Member viz., the Leader of Opposition would not vitiate the majority decision. It is further stated that the 3rd respondent was selected to the Indian Administrative Service in the year 1975. He worked in the Government of Tamil Nadu in various capacities including as head of various departments and as Secretary to the Government. During his lengthy service he performed many quasi-judicial functions. He was also the State Vigilance Commissioner between 2007 and 2008. Between 2008 and 2010 he was the Chief Secretary to the Government of Tamil Nadu dealing with the entire gamut of governance and administration in the State of Tamil Nadu. He has consistently held high level positions in the State and Central Governments involving policy formulation, implementation and co-ordination with various agencies. Based on his wide knowledge and rich experience in areas such as law, administration and governance, he is fully entitled to be considered as a person of eminence in public life, and thus satisfies the qualification mentioned in Section 15(5) of the Act.

9. In the counter affidavit earlier filed by the 1st respondent ' State it was stated inter alia that the selection of the State Chief Information Commissioner was made strictly following the provisions of Section 15(3) of the Act and the selection is totally transparent. A Committee was constituted following the procedure contemplated under Section 15(3) of the Act. A communication dated 03.08.2010 was sent to the Leader of the Opposition to attend the Committee meeting on 23.08.2010 constituted under Section 15(3) of the Act. Subsequently, the Leader of the Opposition addressed a letter to the Government seeking certain particulars with regard to the list of applicants. She was replied that the information sought for will be provided at the time of meeting. Again she sent a letter on 22.08.2010 insisting upon her earlier demand. Again she was replied with the same answer. Ultimately, she did not attend the meeting. In the counter it was further stated that the posts of State Chief Information Commissioner and State Information Commissioners are not civil posts warranting requirement of calling for applications by way of issuing notification. The procedure followed in the recruitment of Government Servants cannot be followed here. However, all the applications received were placed before the Committee. The Committee has the power to recommend the name of persons either from among the applicants or from others. The power of recommendation vests only with the Selection Committee. In the present appointment, the 3rd respondent was recommended by the Selection Committee and as per the recommendation, the appointment was made by the Governor. In spite of intimation regarding the meeting the Leader of the Opposition did not attend the meeting which was held on 23.08.2010. Therefore, as per the precedent which was followed on 11.04.2008, when the Leader of the Opposition did not attend the meeting, the majority view of the Committee was considered and the

3rd respondent's name was recommended to the Governor for appointment as State Chief Information Commissioner.

10. However, in the second counter affidavit filed by the present Government in W.P. No. 12325 of 2011, a different stand has been taken that the appointment of the Chief Information Commissioner has not been made in accordance with the procedure laid down under Section 15(3) of the Act. It is stated that the Chief Minister and the Minister for Finance nominated by the then Chief Minister attended the meeting on 23.08.2010 and took a decision for the appointment of the 6th respondent as the State Chief Information Commissioner. In both the cases there was no consultation with the Leader of the Opposition. It is further stated that the Leader of the Opposition addressed a letter to the government on 21.08.2010 that she came to know that the State Information Commission is not functioning on the expected line and the procedure adopted for the appointment of Chief Information Commissioner was not transparent. Further, it was also stated in the said letter that out of the 11 applications received 7 were rejected without assigning proper reason. In the said letter she also requested the government to furnish copies of the applications received in this regard. But, she had been replied that the copies of the applications will be furnished only at the time of the meeting. Again, the Leader of the Opposition addressed a letter to the Government on 22.08.2010 stating that time is needed to scrutinize the details of the applicants, and since, copies of the applications are available with the other two members of the Committee, it is improper to deny the same to her. For which, the Government sent a reply dated 23.08.2010 declining to give the details before the meeting stating that during 2005 the copies were not circulated before the meeting. Again, the Leader of the Opposition sent a reply stating that at that time no body asked for it,

and hence, it would not be justifiable to reject her request this time.

11. We have heard Mr. Manikandan Vathan Chettiar, learned counsel for the petitioner in W.P. No.12325 of 2011 and Mr. N.L. Raja, learned counsel for the petitioners in W.P. Nos.2766 and 27666 of 2010. We have also heard the learned Advocate General, the learned senior counsel and the learned Additional Government Pleader appearing on behalf of the respondents.

12. The Right to Information Act, 2005 is a social welfare legislation and is a special law, enacted to ensure smoother and greater access to public information by establishment of a machinery and to ensure maximum disclosure of the information. The Act provides that all citizens of India shall have the right to information. The Act confers a great responsibility on the shoulders of those who seek information and also those who administer the provisions of the Act.

13. Section 2(h) of the Act defines public authority, which means any authority or body or institution of self-Government establishment or constituted by or under the Constitution or by any other law made by the Parliament or the Legislatures. Under Section 4 of the Act, every public authority shall

- a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated;
- (b) publish within one hundred and twenty days from the enactment of this Act,-
 - (i) the particulars of its organization, functions and duties;

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- (ii) the powers and duties of its officers and employees;
 - (iii) the procedure followed in the decision making process, including channels of supervision and accountability;
 - (iv) the norms set by it for the discharge of its functions;
 - (v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
 - (vi) a statement of the categories of documents that are held by it or under its control;
 - (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;
 - (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;
 - (ix) a directory of its officers and employees;
 - (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;
 - (xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
 - (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
 - (xiii) particulars of recipients of concessions, permits or authorizations granted by it;
 - (xiv) details in respect of the information, available to or held by it, reduced in an electronic form;
 - (xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
 - (xvi) the names, designations and other particulars of the Public Information Officers;
 - (xvii) such other information as may be prescribed; and thereafter update these publications every year.
14. The Chief Information Commissioner and the Information Commissioners have been defined under Section 2(d) of the Act. The procedure for appointment has been provided under Section 15 of the said Act. For better appreciation, Section 15 is reproduced herein below :
- Section 15 - Constitution of State Information Commission.
- (1) Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the..... (name of the State) information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.
 - (2) The State information Commission shall consist of-
 - (a) the State Chief information Commissioner, and
 - (b) such number of State information Commissioners, not exceeding ten, as may be deemed necessary.
 - (3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a Committee consisting of-
 - (i) the Chief Minister, who shall be the Chairperson of the Committee;
-

(ii) the Leader of Opposition in the Legislative Assembly; and

(iii) a Cabinet Minister to be nominated by the Chief Minister. Explanation.--For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognized as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of Opposition.

(4) The general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner who shall be assisted by the State Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State Information Commission autonomously without being subjected to directions by any other authority under this Act.

(5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

(6) The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

(7) The headquarters of the State Information Commission shall be at such place in the State as the State Government may, by notification in the Official Gazette, specify and the State Information Commission may, with the previous approval of the State Government, establish

offices at other places in the State.

15. From a bare perusal of the aforesaid provision, it is manifest that the State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a Committee consisting of the Chief Minister, the Leader of the Opposition and a Cabinet Minister to be nominated by the Chief Minister. The Committee so constituted under the Act is a statutory body.

16. One of the grounds of challenge is that Section 15 of the Act does not provide any guideline for appointment and therefore, the appointment made by the Committee is vitiated in law. We do not find force in the submission made by the learned counsel. From a bare reading of the relevant provisions of the Act, it is manifest that the source of power for the appointment of the Chief Information Commissioner and the State Information Commissioners is Section 15 of the Act and therefore, the exercise of power cannot be diluted by issuing any guidelines. It is worth to mention here that similar provision contained in Section 4 of the Central Vigilance Commission Act, 2003 in the matter of appointment of Chief Vigilance Commissioner and the Vigilance Commissioner. According to that Section, the Chief Vigilance Commissioner and Vigilance Commissioner shall be appointed on the recommendation of Committee consisting of the Prime Minister (as Chairman), the Minister of Home Affairs and the Leader of Opposition in the House of the People (as Members).

17. The aforesaid provision of the Act and the manner of appointment has been discussed at length in the case of Centre for PIL vs. Union of India, MANU/SC/0179/2011 : (2011) 4 S.C.C. 1, where the appointment of P.J. Thomas as the Chief Vigilance Commissioner was challenged. In the landmark judgment rendered by the Supreme Court, their lordships (S.H. Kapadia, C.J.) observed :

43. Appointment to the post of the Central Vigilance Commissioner must satisfy not only the eligibility criteria of the candidate but also the decision making process of the recommendation [see para 88 of *N. Kannadasan vs. Ajoy Khose*, (2009) 7 SCC 1]. The decision to recommend has got to be an informed decision keeping in mind the fact that CVC as an institution has to perform an important function of vigilance administration. If a statutory body like HPC, for any reason whatsoever, fails to look into the relevant material having nexus to the object and purpose of the 2003 Act or takes into account irrelevant circumstances then its decision would stand vitiated on the ground of official arbitrariness see *State of Andhra Pradesh v. Nalla Raja Reddy*, (1967) 3 SCR 28. Under the proviso to Section 4(1), the HPC had to take into consideration what is good for the institution and not what is good for the candidate [see para 93 of *N. Kannadasan* (supra)]. When institutional integrity is in question, the touchstone should be “public interest” which has got to be taken into consideration by the HPC and in such cases the HPC may not insist upon proof [see para 103 of *N. Kannadasan* (supra)].

44. We should not be understood to mean that the personal integrity is not relevant. It certainly has a co-relationship with institutional integrity. The point to be noted is that in the present case the entire emphasis has been placed by the CVC, the DoPT and the HPC only on the bio-data of the empanelled candidates. None of these authorities have looked at the matter from the larger perspective of institutional integrity including institutional competence and functioning of CVC. Moreover, we are surprised to find that between 2000 and 2004 the nothings of DoPT dated 26th June, 2000, 18th January, 2001, 20th June, 2003, 24th February, 2004, 18th October, 2004 and 2nd November, 2004 have all observed that penalty proceedings may be initiated against Shri P.J. Thomas. Whether State should initiate such

proceedings or the Centre should initiate such proceedings was not relevant. What is relevant is that such nothings were not considered in juxtaposition with the clearance of CVC granted on 6th October, 2008. Even in the Brief submitted to the HPC by DoPT, there is no reference to the said nothings between the years 2000 and 2004. Even in the C.V. of Shri P.J. Thomas, there is no reference to the earlier nothings of DoPT recommending initiation of penalty proceedings against Shri P.J. Thomas. Therefore, even on personal integrity, the HPC has not considered the relevant material. The learned Attorney General, in his usual fairness, stated at the Bar that only the Curriculum Vitae of each of the empanelled candidates stood annexed to the agenda for the meeting of the HPC. The fact remains that the HPC, for whatsoever reason, has failed to consider the relevant material keeping in mind the purpose and policy of the 2003 Act.

18. One of the arguments advanced before the Supreme Court was that the recommendation of the High Power Committee has to be unanimous and if the unanimity is ruled out, then the very purpose of inducting the Leader of Opposition in the process of selection will stand defeated because if the recommendation of the Committee were to be arrived at by majority, it would always exclude the Leader of Opposition, since the Prime Minister and the Home Minister will always be *ad idem*. Refuting the said submission, their lordships held :

81. We find no merit in these submissions. To accept the contentions advanced on behalf of the Petitioners would mean conferment of a “veto right” on one of the members of the HPC. To confer such a power on one of the members would amount to judicial legislation. Under the proviso to Section 4(1) Parliament has put its faith in the High Powered Committee consisting of the Prime Minister, the minister for Home Affairs and the Leader of the Opposition in the House of the People. It is presumed that

such High Powered Committee entrusted with wide discretion to make a choice will exercise its powers in accordance with the 2003 Act, objectively and in a fair and reasonable manner. It is well settled that mere conferment of wide discretionary powers per se will not violate the doctrine of reasonableness or equality. The 2003 Act is enacted with the intention that such High Powered Committee will act in a bipartisan manner and shall perform its statutory duties keeping in view the larger national interest. Each of the Members is presumed by the legislature to act in public interest. On the other hand, if veto power is given to one of the three Members, the working of the Act would become unworkable.

19. On the basis of the law laid down by the Supreme Court as quoted hereinbefore, it is clear that though the Committee can take a unanimous decision, but in the absence of unanimity, it can be decided by majority. As noticed above, Section 15(3) of the Act itself provides the procedure of appointment on the basis of the recommendation made by the Committee consisting of three members, i.e., Chief Minister, Cabinet Minister and the Leader of Opposition. Hence, the question of consultation does not arise.

20. We have perused the records with nothings maintained by the State Government. The translated copy of the proceedings of the Committee dated 23.8.2010 supplied by the respondent, which is part of the file, reads as under:

Minutes of the meeting of the Committee constituted under Section 15(3) of the Right to Information Act, 2005 held on 23.8.2010 at 5.00 p.m. in the Chamber of the Hon'ble Chief Minister.

The Committee stipulated under Section 15(3) of the Right to Information Act for selection of State Chief Information Commissioner met at 5.00 p.m. today (23.8.2010). The Chairman of

the Committee Hon'ble Chief Minister and the Hon'ble Finance Minister Thiru. K. Anbazhagan participated in the meeting. Hon'ble Leader of the Opposition, by letters dated 21.8.2010 and 22.8.2010, had sought the particulars of the eligible persons to be considered by the said Committee today. Reply was sent that the particulars regarding the persons who have applied for the Chief Information Commissioner and the applications would be placed before the Committee meeting. However, Hon'ble Leader of the Opposition Selvi. J. Jayalalitha did not participate in the meeting.

2. The Bio-data of the persons who have applied for the Chief Information Commissioner were examined. Of this, Selvi/Tmt. P. Prabha, D. Bharathi and P.S. Gowri are engaged in Social Work. However, based on the Bio-data submitted by them, it cannot be considered that they are persons of eminence in Public Life with Wide Knowledge and Experience (Pattarivu) as referred in the Act.

3. On examining the Bio-data of Tvl. S. Baskar and T. Ramakrishnan, it is seen that they belong to Information Technology Sector. Based on the Bio-data submitted by them, it cannot be considered that they are persons of eminence in Public Life with Wide Knowledge and Experience (Pattarivu) as referred in the Act.

4. Dr. Thiru. N. Satchidhanandam is a Retired Medical Officer. He has not submitted details of full experience in Public Administration. Based on the Bio-data submitted by him, it cannot be considered that he is a person of eminence in Public Life with Wide Knowledge and Experience (Pattarivu) as referred in the Act.

5. Thiru. Krishnaraj Rao is an Activist in Right to Information. Though he has stated that he has 24 years of experience as a Journalist, he has no given details about that. Further, till 1988, he was a Freelance Journalist. Therefore, it cannot be considered that he is a person of

eminence in Public Life with Wide Knowledge and Experience (Pattarivu) as referred in the Act.

6. Tmt. Thangam Sankaranarayanan has served in Indian Administrative Service for 36 years and retired in April, 2010 in the cadre of Chief Secretary. It can be considered she has eminence in Public Administration and Governance as stipulated in the Act.

7. Thiru. K.S. Sripathy has served in Indian Administrative Service for 35 years. Apart from having held several positions, he is working as Chief Secretary. It can be considered that he has eminence in Public Administration and Governance as stipulated in the Act.

8. Therefore, out of 9 persons who have applied for the post of the State Chief Information Commissioner, since only two have fully satisfied the requirements of the Act, out of these two applications, taking into consideration that Thiru. K.S. Sripathy, I.A.S., has been working as Chief Secretary efficiently for about 2 years

This Committee unanimously recommends that Thiru. K.S. Sripathy may be appointed as State Chief Information Commissioner.

(M. Karunanidhi)
(Chief Minister/Chairman)

(K. Anbazhagan)
(Finance Minister/Member)

21. Learned counsel for the petitioners argued that the decision taken by the Committee recommending the name of the third respondent for the post of Chief Information Commissioner is not an 'informed decision' inasmuch the information sought for by the Leader of Opposition was not supplied to her.

22. We do not find force in the submission made by the learned counsel. From the nothings quoted hereinbefore, it is evidently clear that the Leader of Opposition was duly informed about the Meeting of the Committee held on 23.8.2010, which was duly acknowledged on

her behalf, and she was also sent a reply to her request seeking certain particulars, that all papers shall be furnished at the Meeting. In spite of that, the Leader of Opposition had chosen not to attend the Meeting, without assigning any reasons. Hence, it cannot be held that the decision taken by the Committee was arbitrary or suffers from bias.

23. As noticed above, in the first counter affidavit filed by the first respondent 'State' it was stated that the selection to the post of the State Chief Information Commissioner was made strictly following the provisions of Section 15(3) of the Act and the selection was fully transparent. A Committee was constituted following the procedure contemplated under the aforesaid provision and the Leader of the Opposition was requested to attend the meeting. But the Leader of the Opposition did not attend the meeting. Consequently, unanimous decision was taken for the appointment of respondent '3' as Chief Information Commissioner. Pending writ petitions there was change in government and a new government came to power. Then it filed a second counter affidavit taking a different stand that the appointment of the Chief Information Commissioner was not made in accordance with the procedure laid down under Section 15(3) of the Act. It is stated that there was no consultation with the Leader of the Opposition, and hence, the appointment is wholly arbitrary.

24. It is well settled that the State or its instrumentalities cannot take a conflicting stand in a case merely because of the change of government. In the case of *State of Haryana Vs. State of Punjab* reported in MANU/SC/0026/2002 : (2002) 2 SCC 507 their Lordships held:-

16. The decisions taken at the governmental level should not be so easily nullified by a change of Government and by some other political party assuming power, particularly when such a decision affects some other State

and the interest of the nation as a whole. It cannot be disputed that so far as the policy is concerned, a political party assuming power is entitled to engraft the political philosophy behind the party, since that must be held to be the will of the people. But in the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty-bound to continue and carry on the unfinished job rather than putting a stop to the same.

25. It is, therefore, clear that unless it is found that the act done by the Government earlier in power is either contrary to the constitutional provisions or unreasonable or against public interest, the State should not change its stand

merely because another political party has come into power. Political agenda of an individual or a political party should not be subversive of the rule of law.

26. It has, therefore, to be held that the process of appointment adopted by the Committee was transparent and in accordance with the provisions contained in Section 15(3) of the Act. Hence, we uphold G.O. Ms. No.124 dated 1.9.2010 appointing the third respondent (sixth respondent in W.P. No.12325 of 2011) as Chief Information Commissioner and reject the prayer for issuance of a Writ of Quo Warranto against the 3rd respondent.

27. For the aforesaid reasons, these writ petitions, having no merit, are dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petitions are closed.

IN THE HIGH COURT OF PUNJAB AND HARYANA

LPA Nos. 744 & 745 of 2011

Decided On: 28.04.2011

First Appellate Authority-cum-Additional Director General of Police & Anr.

Vs.

Chief Information Commissioner, Haryana & Anr.

Hon'ble Judges:

Hemant Gupta and A.N. Jindal, JJ.

Subject: Right to Information

JUDGMENT

Hemant Gupta, J.

1. This order shall dispose of LPA Nos. 744 of 2011 and 745 of 2011 arising out of two separate orders passed by learned single Judge raising identical question of law.

2. In LPA No. 744 of 2011, respondent No. 2-Rajender Verma sought information under the provisions of Right to Information Act, 2005 (hereinafter to be referred as the 'Act') in relation to the number of posts available and filled in the cadre of the ASIs/SIs/ Inspectors and language stenographers and a copy of the inquiry report sent to ADGP on 9.8.2008. This information was denied by State Public Information Officer, for the reasons that the same is exempt from disclosure in view of the notification dated 29.12.2005 issued by the Haryana Government under Section 24(4) of the Act. The appeal was also dismissed by learned first, Appellate Authority on 13.2.2009. However, the State Information Commissioner, Haryana accepted the second appeal filed by respondent No. 2 on 16.7.2009. It was specifically pleaded in appeal that the information sought relates to violation of human rights and corrupt practices.

It was prayed that information be supplied for eradication of corruption and violations of human rights from the sensitive department of CID. The appeal was allowed and the writ petition against the said order was dismissed. Learned single Judge returned the following finding:

11. As is evident from the record that the information sought by respondent No. 2 is general in nature, such as number of posts, occupied, vacant and adjusted between 1989-2003 of ASI/SI and Inspector. He has also sought the copy of inquiry report of complaint sent to Additional Director General of Police of Criminal Investigation Department on 9.8.2008 which related to corruption and human rights violation by the recruitment agency. Taking the nature of the information sought by respondent No. 2 into focus, the argument of State Counsel that the information cannot be supplied in view of the notification, pales into insignificance, particularly when such information pertaining to allegations of corruption and human rights violation are not otherwise covered under the exemption clause of Section 24(4) of the Act as urged on behalf of the petitioners.

3. In LPA No. 745 of 2011, respondent No. 2 sought information in respect of action taken or suggested against the persons for grabbing and constructing the building illegally on the Government land, supply of investigation

report of the inquiry team of Shri Narinder ASI of the CM, Flying squad and the information collected by the Inquiry Officer. The information was again declined for the reasons that CID Department is exempt from the provisions of Act in view of the notification dated 29.12.2005. The First Appellate Authority has dismissed the appeal filed. In second appeal before the State Information Commissioner, it was specifically pleaded that to protect the Haryana Government land from illegal hands of land grabbers is a matter of public importance and relates with equality of all citizens before the constitutional and legally constituted authorities and that the question of corruption at the level of District Administration arises. Learned State Information Commissioner allowed the appeal as the matter pertains to one involving the alleged illegal occupation of Government land. Learned single Judge in a writ petitions filed by the State held that the information sought by respondent No.2 pertains to allegation of corruption and against those persons who have illegally constructed buildings on the Government land, therefore, such information is not covered under the exemption clause.

4. Since the question of law raised in both appeals is common, therefore, the appeals are being taken for decision together. It is argued by learned counsel for the appellant that the appellant-authority is exempted from the purview of the Act on the basis of the notification dated 29.12.2005. Since, the Act itself is not applicable, the information cannot be sought under the Act by respondent No. 2. It is argued that the information which is sought does not pertain to violation of human rights or corruption, therefore, the same cannot be supplied in terms of exception to Section 24(4) of the Act. The notification dated 29.12.2005 and the relevant extract of Section 24(4) of the Act reads as under:

Notification: dated 29th December, 2005

No. 5/4/2005-IAR - In exercise of the power conferred by sub-section (4) of section 24 of the "Right to Information Act" 2005 (Central Act No. 22 of 2005), the Governor of Haryana hereby specifies the intelligence and security organizations as mentioned in the schedule given below for the purpose of the said sub-section.

Schedule

- (i) State Criminal Investigation Department (C.I.D.) including the Crime Branch:
- (ii) Haryana Armed Police:
- (iii) Security Organization of Police:
- (iv) Haryana Police Telecommunication Organization:
- (v) India Reserve Battalion:
- (vi) Commando

Section 24(4)

Nothing contained in this Act shall apply to such intelligence and security organizations, being organizations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify:

Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:

Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in Section 7, such information shall be provided within forty-five days from the date of the receipt of request.

5. Learned counsel for the appellant has argued that the learned State Information Commissioner has found that the information, which is sought by the applicant-respondent No. 2, is not sensitive in nature dealing with sovereignty and integrity of India, therefore, such information can be disclosed is not tenable as such ground for non-disclosure is contemplated by Section 8 of the Act. It is contended that in terms of Section 24(4) of the Act, the information which can be disclosed is in respect of the allegations of corruption and human rights violations but since the information sought does not relate to any of the excepted matters, the information cannot be sought.

6. We have heard learned counsel for the appellant and find rib merit in the present appeal. Learned single Judge has held that the information sought pertains to allegation of corruption and, therefore, cannot be withheld by the appellant. The question needs to be examined is whether the information in respect of encroachment of the public land or of filling up the public post can be said to be the information “pertaining to allegation of corruption”.

7. The expression “pertaining to allegation of corruption” is not defined in the Act. Even, the Prevention of Corruption Act, 1988 does not define what are the allegations pertaining to corruption? In the absence of any statutory definition in the Act, the ordinary meaning to the expression used in the Act has to be applied. The expression “pertaining to allegation of corruption” cannot be defined. It includes within its meaning many colours and shades of corruption. There cannot be any exhaustive definition that what are the allegations pertaining to corruption. But an attempt can be made to understand the scope of the expression used in the statute.

8. The General Assembly of United Nations in its meeting on 28th January, 1997, vide resolution (A/RES/51/59) (available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Appendix 1.pdf>) decided to take action against corruption. Such decision was necessitated on account of the seriousness of the problems posed by corruption which may endanger the stability and security of the societies, undermine the, values of democracy and morality and jeopardize social, economic and political development. The United Nations resolved after having convinced that the corruption is a phenomenon that currently crosses national borders and affects all societies and economics, international co-operation to prevent and control it as an essential.

9-10. After considering the work carried out by the international organizations, the United Nations resolved the International Code of Conduct of public Officials. The same are reproduced as under:

International Code of Conduct for Public Officials

I. GENERAL PRINCIPLES

1. A public office, as defined by national law, is a position of trust, implying a duty to act in the public interest. Therefore, the ultimate loyalty of public officials shall be to the public interests of their country as expressed through the democratic institutions of Government.

2. Public officials shall ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies. They shall at all times seek to ensure that public resources for which they, are responsible are administered in the most effective and efficient manner.

3. Public officials shall be attentive, fair and impartial in the performance of their functions

and, in particular, in their relations with the public. They shall at no time afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual, or otherwise abuse the power and authority vested in them.

II. CONFLICT OF INTEREST AND DISQUALIFICATION.

4. Public officials shall not use their official authority for the improper advancement of their own or their family's personal or financial interest. They shall not engage in any transaction, acquire any position or function or have any financial, commercial or other comparable interest that is incompatible with their office, functions and duties or the discharge thereof.

5. Public officials, to the extent required by their position, shall, in accordance with laws or administrative policies, declare business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest. In situations of possible or perceived conflict of interest between the duties and private interests of public officials, they shall comply with the measures established to reduce or eliminate such conflict of interest.

6. Public officials shall at no time improperly use public moneys, property, services or information that is acquired in the performance of, or as a result of, their official duties for activities not related to their official work.

7. Public officials shall comply with measures established by law or by administrative policies in order that after leaving their official positions they will not take improper advantage of their previous office.

III. DISCLOSURE OF ASSETS

8. Public officials shall, in accord with their position and as permitted or required by

law and administrative policies, comply with requirements to declare or to disclose personal assets and liabilities, as well as, if possible, those of their spouses and/or dependants.

IV. ACCEPTANCE OF GIFTS OR OTHER FAVOURS

9. Public officials shall not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their duties or their judgment.

V. CONFIDENTIAL INFORMATION

10. Matters of a confidential nature in the possession of public officials shall be kept confidential unless national legislation, the performance of duty or the needs of justice strictly require otherwise. Such restrictions shall also apply after separation from service.

VI. POLITICAL ACTIVITY

11. The political or other activity of public officials outside the scope of their office shall, in accordance with laws and administrative policies, not be such as to impair public confidence in the impartial performance of their functions and duties.

11. The first general principle is that the public office is a position of trust, implying the duty to act in the public interest and the public officials are to ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies. The public officers are to be attentive, fair and impartial in the performance of their functions and had no time to afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual, or otherwise abuse the power and authority vested in them. Therefore, the information

which relates to the working of a public office and whether such office acted in accordance with laws would be relevant information so as to exclude the allegation of corruption.

12. In Module III of the World Bank meant for “Youth for Good Governance” Distance Learning Program, it is stated that corruption is not just clearly “bad” cases of Government officials skimming off money for their own benefit. It includes cases where the systems do not work well and ordinary people are left in a blind, needing to give a bribe for the medicine or the licenses they need. It is explained that there are many types of corruption, the bribery probably comes first to mind when the word corruption is heard but other common type of corruption is bribery, nepotism, fraud and embezzlement. It explains the following words:

Bribery: An offer of money or favors to influence a public official.

Nepotism: Favouritism shown by public officials to relatives or close friends.

Fraud: Cheating the Government through deceit.

Embezzlement: Stealing money or other Government property.

Administrative Corruption: Corruption that alters the implementation of policies, such as getting a license even if you do not qualify for it.

Political Corruption: Corruption that influences the formulation of laws, regulations and policies such as revoking all licenses, and gaining the sole right to operate the beer or gas monopoly.

13. The scope of expression administrative corruption includes arbitrariness in implementation of policies, grant of benefit to the officers in violation of the Rules. Therefore, the information in respect of the available

vacancies and the manner in which such vacancies are filled up would be relevant to exclude the allegations of corruption.

14. Another write up is available on <http://www.thegeminigeek.com>. The word corruption is explained as, destructive, ruining or the spoiling of the society or a nation. The corrupt society stops prevailing integrity, virtue or moral principles. It changes for the worse. Such a society begins to decay and sets itself on the road to self-destruction. Corruption is an age old phenomena. Selfishness and greed are the two main causes of corruption. Political corruption is the abuse of the powers by State officials for their unlawful private gain. A corrupt society is characterized by immorality and lack of fear and respect for the law. Corruption cannot be divorced from economics and inequality of wealth, low wages and salaries are some of the economic causes of corruption. Corruption has prevailed in all forms of Government. Various forms of corruption include extortion, graft, bribery, cronyism, nepotism, embezzlement and patronage. Corruption allows criminal activities such as money laundering, extortion and drug trafficking to thrive.

15. As mentioned above, the expression pertaining to allegation of corruption cannot be exhaustively defined. The Act is to step-in-aid to establish the society governed by law in which corruption has no place. The Act envisages a transparent public office. Therefore, even in organizations which are exempt from the provisions of the Act, in terms of the notification issued under Section 24(4) of the Act, still information which relates to corruption or the information which excludes the allegation of corruption would be relevant information and cannot be denied for the reasons that the organization is exempted under the Act.

16. The information sought in the present case is in respect of the number of vacancies

which have fallen to the share of the specified category and whether such posts have been filled up from amongst the eligible candidates. If such information is disclosed, it will lead to transparent administration which is antithesis of corruption. If organization has nothing to hide or to cover a corrupt practice, the information should be made available. The

information sought may help in dispelling favouritism, nepotism or arbitrariness. Such information is necessary for establishing the transparent administration. Therefore, we do not find any illegality in the order passed by the State Information Commissioner, Haryana and affirmed by learned single Judge in the orders impugned in the present appeals.

IN THE HIGH COURT OF KERALA

W.A. No. 2781 and connected cases of 2009

Decided On: 17.02.2010

Appellants: **Centre of Earth Science Studies**

Vs.

Respondent: **Anson Sebastian**

Hon'ble Judges:

P.R. Raman and C.N. Ramachandran Nair, JJ.

Subject: Right to Information

JUDGMENT

C.N. Ramachandran Nair, J.

1. The appellant is a State Government agency engaged in studies on earth science. The first respondent, a Scientist working with the appellant applied to the Information Officer of the appellant for getting information pertaining to certain documents relating to domestic enquiry against another employee and also for getting entries in the Confidential Reports of six other employees of the appellant. However, the Information Officer rejected the first respondent's application. Consequent upon which the first respondent filed appeals against the orders of the Information Officer before the State Information Commission, which allowed the appeals directing the appellant to give all the details and copies of documents asked for by the first respondent. The appellant filed various Writ Petitions challenging the orders of the State Information Commission, which were rejected by the learned Single Judge. Even though five Writ Petitions were filed by the appellant before the learned Single Judge, all were dismissed by a common judgment. Though appeals were filed against all the Writ Petitions, two of the Writ Appeals were withdrawn by the appellant. The above are

the remaining three cases of which two are against the orders of the learned Single Judge upholding State Information Commission's direction to give copies of Confidential Reports in respect of six Scientists of the appellant and in the third appeal challenge is against direction to give copies of certain documents in domestic enquiry proceedings conducted by the appellant in respect of one of its employees. We have heard counsel appearing for the appellant, Standing Counsel appearing for the State Information Commission and counsel appearing for the first respondent in all the appeals.

2. While counsel for the appellant has claimed immunity based on Section 8(1)(e) and 8(1)(j) of the Right to Information Act, 2005 and relied on judgment of this Court in Public Information Officer and Anr. v. State Information Commission and Anr. in W.P.(C) No. 9445/2009 dated 28.10.2009 2010(1) KLT 69 (C. No. 82), counsel appearing for respondents relied on decision of the Calcutta High Court in University of Calcutta v. Pritam Rooj reported in MANU/WB/0084/2009 : AIR 2009 (Cal.) 97 and a Division Bench judgment of this Court in V.S. Lee v. State of Kerala and Ors. in W.A. No. 1990/2007 in support of their contentions. It is a settled position particularly by virtue of the Division Bench judgment of this Court that the provisions of the Right to Information Act should be given a liberal construction and, therefore, what is to be considered is whether

the immunity or exemption claimed by the appellant under Section 8(1)(e) and 8(1)(j) of the Act is tenable. For easy reference, the said Section is extracted hereunder:

Section 8(1)(e) - Information available to a person, in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.

8(1)(j) - Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

3. We are of the view that Section 8(1)(e) has no application because it deals with information available with the person in his fiduciary relationship with another. Information under this head is nothing but information in trust which but for the relationship would not have been conveyed or known to the person concerned. This applies to the relationship that exists between a patient and a Doctor, a lawyer and a client etc. We do not find any application of this provision in relation to the information sought by an employee about other co-employees of the same employer. Therefore, the claim of immunity by the appellant under Section 8(1)(e), in our view, was rightly rejected by the learned Single Judge and we, therefore, uphold the finding of the learned Single Judge.

4. The next question to be considered is whether the information sought by the first respondent relates to personal information of other employees, the disclosure of which

is prohibited under Section 8(1)(j) of the Act. Here again, we notice that under exceptional circumstances even personal information, disclosure of which is prohibited under the main clause, can be disclosed if the Central Public Information Officer or the State Public Information Officer or the appellate authority as the case may be, is satisfied that the larger public interest justifies disclosure of such information. What is immune from disclosure as personal information is not one relating to any public activity or interest and what is prohibited is furnishing of information which causes unwarranted invasion of the privacy of the individual. In this case we notice that the information sought by the first respondent pertains to copies of documents furnished in a domestic enquiry against one of the employees of the appellant-organisation. Domestic enquiry is an open trial which is essentially initiated as part of disciplinary proceedings against the employee. Domestic enquiry involves production of evidence including documents, some of which are even public documents. We do not know how documents produced in a domestic enquiry can be treated as documents relating to personal information of a person, the disclosure of which will cause unwarranted invasion of his privacy. Similar is the position with regard to the particulars of Confidential Reports maintained in respect of co-employees of the first respondent all of whom are Scientists. Confidential Reports are essentially performance appraisal by higher officials which along with other things constitute the basis for promotions and other service benefits. Counsel for the State Information Commission has produced a Government of India Office Memorandum dated 14.5.2009 by which the Confidential Reports have been taken away and in their place what is authorised to be maintained is annual appraisal reports. According to Standing Counsel for the Information Commission, the Confidential Reports are no longer personal

documents or private documents and all the employees are entitled to know the details of the same. Counsel appearing for the first respondent submitted that first respondent has grievance in her service and in order to satisfy herself about the propriety and correctness of promotions and other benefits given to similar employees, she wants details of the same. We

do not think the Confidential Reports of the employees maintained by the appellant can be treated as records pertaining to personal information of an employee, the publication of which is prohibited under Section 8(1)(j) of the Act. We, therefore, concur with the findings of the learned Single Judge on this issue as well. Consequently Writ Appeals are dismissed.

